TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1648.

PEDRO DELGADO, APPELLANT,

vs.

FRANCISCO CHAVEZ, SHERIFF OF SANTA FÉ COUNTY, TERRITORY OF NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED MARCH 6, 1891.

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1 Be it remembered that on the 23rd day of January, A. D. 1891, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a petition for a writ of *habeas corpus;* which said writ is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court of the Territory of New Mexico.

To the honorable chief justice and associate justices of the supreme court of the Territory of New Mexico:

Your petitioner, Pedro Delgado, most respectfully represents unto this honorable court that he is now confined, imprisoned, and restrained of his liberty in the county jail of Santa Fé county, situate at the city of Santa Fé, in said county and Territory, and that he is so confined, imprisoned, and restrained by Francisco Chaves, sheriff of said Santa Fé county.

He further states that he has not been committed to said jail and that he is not confined therein and imprisoned or restrained of his liberty by said Chaves by virtue of any final judgment or decree of any competent tribunal, nor by virtue of an execution issued upon any judgment or decree of any competent tribunal, as is set forth, specified, and defined in section 2013 of the Compiled Laws of 1884 of this Territory.

The cause or pretense of such confinement, imprisonment, and restraint, according to the best knowledge, information, and belief of your petitioner, is as follows, to wit:

On the 13th day of January, A. D. 1891, Abraham Staab, Juan Garcia, and William H. Nesbitt presented to the Hon. Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, their petition and information, praying for the issuing of an alternative writ of mandamus against this petitioner, the said petition and information being in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé, } *ss:*

In the District Court for said County, Sitting for the Trial of Causes Arising under the Laws of said Territory, at Chambers.

To the Honorable Edward P. Seeds, associate justice of the supreme court of said Territory and judge of said district court:

Your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, residents and qualified voters of the county of Santa Fé, in said Territory, respectfully show unto your honor—

That on the 4th day of November, A. D. 1890, pursuant to the laws of the Territory of New Mexico governing the same, there was held an election, at which, among others, candidates for the offices

of county commissioners from the first, second, and third districts of said county of Santa Fé were voted for; that at said election your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, were, respectively, candidates for the office of county commissioners from the said first, second, and third districts respectively, and each received a majority of all the votes of legal and qualified voters cast at said election for said office of county commissioners over their opponents, respectively, Charles M. Creamer, Higinio Martinez, and George L. Wyllys, with the exception of your relator Abraham Staab, who received the same number of votes of legal and qualified voters voting at the said election for the office of county com-
2 missioner from the first district of said county as did his opponent, Charles M. Creamer.

And your relators further show unto your honor that afterwards, to wit, on the — day of November, A. D. 1890, John H. Sloan, Teodoro Martinez, and George L. Wyllys, then members of the board of county commissioners of said county of Santa Fé, met at the court-house of said county, and, sitting as a canvassing board for the purpose of canvassing the returns of the said general election held in said county and Territory on the 4th day of November, A. D. 1890, proceeded to canvass the returns of the said general election so held as aforesaid, but then and there neglected and refused to canvass the returns from all of the precincts of said county in which the said election was held, according to the laws of this Territory, the said John H. Sloan, Teodoro Martinez, and George L. Wyllys, sitting as a canvassing board as aforesaid, then and there refusing and neglecting to count the returns of said election from precincts numbers one, two, sixteen, and eight of said county, the returns from which several precincts were before said board, there being included as part of said returns a certificate of two of the judges and both clerks of election of precinct number eight, under section 1196 of the Compiled Laws of 1884 and following sections, which said certificate showed the true result of the election held on said day in said precinct number eight instead of the poll books and certificate thereof, the poll books and certificate of said precinct and the ballot box thereof having been purloined and taken away from the custody and possession of said board during the time the said board was canvassing the returns of said general election, and the evidence of the result of said election in said precent before said board was said certificate.

And your relators further show to the court that thereupon the said board of county commissioners, sitting as a board of canvassers as aforesaid, then neglecting and refusing to canvass the returns of the said before-mentioned precinct, one Benjamin M. Read, a resident and qualified voter of Santa Fé county, on the 12th day of November, A. D. 1890, filed in the office of the clerk of this court his petition for a writ of mandamus upon said board of commissioners, requiring said board to count and certify such returns, including the certificate of said precinct number eight of said county.

And your relators further state and show that, after due hearing had upon the issue of said writ, on the 18th day of November, 1890,

a peremptory writ of mandamus issued out of this court, directed to the said John H. Sloan, Teodoro Martinez, and George L. Wyllys, requiring them immediately upon the receipt of which writ to meet as a board of canvassers and proceed to canvass the returns of election from said precincts number one, two, sixteen, and eight, including said certificate from precinct number eight of said county.

And your relators further show unto your honor that the said George L. Wyllys, one of the members of said board, made return to said peremptory writ, stating that he was willing to meet and canvass said return in accordance with the said writ, but the said John H. Sloan and the said Teodoro Martinez, then and there refused to obey the writ issued as aforesaid out of this honorable court. Whereupon the said John H. Sloan and the said Teodoro Martinez were committed for contempt of court until such a time as they should meet and canvass said returns as in said writ of
3 mandamus required.

And your relators further show unto your honor that afterwards the said John H. Sloan and the said Teodoro Martinez, having been incarcerated in the county jail of said county in accordance with the order of his honorable court, were released therefrom by an alleged writ of *habeas corpus* issued by three justices of the peace of the said county of Santa Fé, without jurisdiction or lawful authority.

And your relators further show unto your honor that afterwards the said John H. Sloan, chairman of said board, appeared before this honorable court and stated his willingness to obey said writ, and did then and there as such chairman, together with the clerk of said board, one Marcelino Garcia, issue a notice to the said George L. Wyllys and Teodoro Martinez to meet, on a day fixed in said notice, with him as a board of canvassers and canvass said returns, as in said writ of mandamus required; but your relators state upon information and belief that the said notice was given by the said John H. Sloan evasively, colorably, collusively, and without any intention on his part or on the part of the said George L. Wyllys or the said Teodoro Martinez to obey in any respect the commands and requirements of the said writ, and at that time or shortly thereafter the said George L. Wyllys and the said Teodoro Martinez, absolutely rejecting and abandoning their said offices, absconded and put themselves out of the reach of lawful process; whereupon, because of the vacancies created by such abandonment and rejecting of functions, Benjamin M. Thomas, then acting Governor of the Territory of New Mexico, on the 5th day of December, A. D. 1890, did then and there appoint and commissioned George W. North and Frederick Grace to fill the vacancies in said board caused by the abandonment of their offices by the said George L. Wyllys and Teodoro Martinez.

And your relators further show unto your honor that afterwards, on the — of December, A. D. 1890, the said George W. North and the said Frederick Grace took the oath of office and duly qualified as such members of the board of county commissioners of said

county and filed their respective bonds, as required by law, and entered upon their duties as members of said board.

And your relators further show and state to your honor that afterwards, to wit, on the — day of December, A. D. 1890, pursuant to an order of this honorable court commanding them so to do, the said board of county commissioners, consisting of the said John H. Sloan, chairman, George W. North, and Frederick Grace, met as a board of canvassers for the purpose of canvassing said election returns in accordance with the requirements of said peremptory writ of mandamus, at the court-house of said county.

And your relators further state and show to the court that the said John H. Sloan, chairman, when said board met as aforesaid, then and there refused to canvass the returns of said election, as by said writ of mandamus he was required to do, except that he joined in the canvass of the said certificate from precinct number eight of said county; whereupon the said George W. North and the said Frederick Grace, sitting as a board of canvassers and duly recognized as such by Marcelino Garcia, clerk of said board, proceeded to canvass and did canvass all the returns of said election, including the return from said precincts numbers one, two, sixteen, and eight, including the judge's certificate from precinct number eight as aforesaid, and then and there the said board of county commis-
4 sioners, sitting as a board of canvassers, declared the result of said election, as shown by said returns, and made return of their action in the premises, in accordance with the said writ of mandamus, to this honorable court.

And your relators further show to the court here that the said board of county commissioners, sitting as a board of canvassers as aforesaid, issued certificates of election to your relators Juan Garcia and William H. Nesbitt, certifying, in accordance with the statute and in accordance with the facts shown by said returns, that they and each of them had received a majority of all the votes of legal and qualified voters cast at said election for the office of county commissioners as aforesaid.

And your relators further state and show to the court that it appearing to said board of canvassers on said day when said returns were canvassed in accordance with the requirements of said writ of mandamus that the said Abraham Staab and the said Charles M. Creamer had received an equal number of votes for the said office of county commissioner, and that a tie existed for said office, upon the suggestion of the said Charles M. Creamer, who was then and there present, as your relators are informed and believe, and according to the statute governing such cases, lots were cast by the said board of canvassers, which casting of lots resulted favorably to Abraham Staab; whereupon he was duly declared elected to said office of county commissioner and duly received said certificate of election therefor.

And your relators further state and show to your honor that among the candidates voted for at the said election was one Pedro Delgado, who was a candidate for the office of probate clerk of said county, and that on the day when said returns were canvassed pur-

suant to the said writ of mandamus it appeared that the said Pedro Delgado had received a majority of all the votes cast at the said election by legal and qualified voters for the said office of probate clerk of said county, and thereupon the said board of canvassers duly declared him elected to said office and issued to him a certificate therefor.

And your relators further show and state to the court that on the 2nd day of January, A. D. 1891, your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, the duly elected board of county commissioners of said county, having first had approved by this honorable court their official bonds in the sum of five thousand dollars, took the oath of office and met in the court-house of said county of Santa Fé and duly organized by electing your relator Abraham Staab chairman of said board.

And your relators further state and show to your honor that thereupon the said Abraham Staab, chairman of the said board of county commissioners, then and there called upon and asked the said Pedro Delgado, probate clerk as aforesaid, then and there acting as said clerk and in possession of the records, books, files, and papers of his office, to act as clerk of said board, as by law he is required to do, and then and there asked and called upon the said Pedro Delgado, probate clerk, to produce the books in which are kept the records of the meetings and proceedings of the board of county commissioners of the county of Santa Fé, which said books were then and there in his possession and custody, and then and there to keep the records of the meeting then and there being held and record the same in the record of meetings and proceedings of the board of county commissioners of said county.

And your relators further state and show unto your honor that then and there the said Pedro Delgado, probate clerk and *ex officio* clerk of the board of county commissioners of said county, neglected and refused and still does neglect and refuse to produce said records and to act as clerk of said board and record the minutes of said meeting so held on the 2nd day of January, A. D. 1891, aforesaid, and refuses to recognize in any manner or act with your relators as such board of county commissioners.

Therefore your relators pray that the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, may be required by a writ of mandamus, issuing out of this honorable court, to produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county, and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, A. D. 1891, and to record in said records of minutes and proceedings the record of minutes and proceedings of all of the meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of the said board which hereafter may be had, and that in doing so he act as the *ex officio* clerk of the board of county commissioners, of which said board your relators, Abraham Staab, Juan Garcia, and William H.

Nesbitt, are members, and that he act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all the resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board, if required by any member; that he sign all orders issued by the board for the payment of money, and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he do recognize said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners af Santa Fé county and as composing the lawful board of county commissioners of said county, and that he do furnish to said board all the books, records, files, and papers of his said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons, except as the law may require him to do, for the inspection and information of private individuals.

And your relators hereby refer as part of the petition to all the papers, records, and proceedings had and now remaining in this court in the said matter of mandamus wherein the said Benjamin M. Read was relator as aforesaid, and also refer to as part of this petition the several certificates of election aforesaid, whereof copies are herewith filed.

And your relators will humbly pray.

ABRAHAM STAAB.

6 TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

Abraham Staab, being duly sworn, upon his oath says that he has read the foregoing petition signed by him and knows the contents thereof, and that the same is true except as to matters and things therein stated upon information and belief, and those he believes to be true.

——— ———.

Subscribed and sworn to before me this 12th day of January, A. D. 1891.

[SEAL.] EDWARD L. BARTLETT,
Notary Public.

[Endorsed:] No. 2838. In the district court, Santa Fé county. A. Staab *et al. vs.* Pedro Delgado, clerk. Petition for mandamus. Filed in my office this Jan. 13th, 1891. A. E. Walker, clerk.

The writ is herewith allowed, with order to show cause, if not obeyed by 7 o'c. p. m. of Tuesday, January 13, 1891.

EDWARD P. SEEDS,
Associate Justice, &c.

And the said district judge, having read and considered the said application, made and entered an order on the 13th day of January, A. D. 1890, that an alternative writ of mandamus be issued in compliance with the prayer of said application and petition, and thereupon the clerk of said district court, in pursuance of such order, issued to said petitioner an alternative writ of mandamus in the words and figures following, to wit:

The Territory of New Mexico to Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, Greeting:

It appearing to the judge of the district court for said county on the information of Abraham Staab, Juan Garcia, and William H. Nesbitt, residents and qualified voters of the county of Santa Fé, in said Territory, that on the 4th day of November, A. D. 1890, pursuant to the laws of the Territory of New Mexico governing the same, there was held an election at which, among others, candidates for the offices of county commissioners from the first, second, and third districts of said county of Santa Fé were voted for; that at said election your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, were, respectively, candidates for the office of county commissioners from the said first, second, and third districts, respectively, and each received a majority of all the votes of legal and qualified voters cast at said election for said office of county commissioners over their opponents respectively, Charles M. Creamer, Higinio Martinez, and George L. Wyllys, with the exception of your relator Abraham Staab, who received the same number of votes of legal and qualified voters voting at the said election for the office of county commissioner from the first
7 district of said county as did his opponent, Charles M. Creamer.

And your relators further show unto your honor that afterwards, to wit, on the — day of November, A. D. 1890, John H. Sloan, Teodoro Martinez, and George L. Wyllys, then members of the board of county commissioners of said county of Santa Fé, met at the court-house of said county and, sitting as a canvassing board for the purpose of canvassing the returns of the said general election held in said county and Territory on the 4th day of November, A. D. 1890, proceeded to canvass the returns of the said general election so held as aforesaid, but then and there neglected and refused to canvass the returns from all of the precincts of said county in which the said election was held, according to the laws of this Territory, the said John H. Sloan, Teodoro Martinez, and George L. Wyllys, sitting as a canvassing board as aforesaid, then and there refusing and neglecting to count the returns of said election from precincts numbers one, two, sixteen, and eight of said county, the

returns from which several precincts were before said board, there being included as part of said returns a certificate of two of the judges and both clerks of election of precinct number eight, under section 1196 of the Compiled Laws of 1884 and following sections, which said certificate showed the true result of the election held on said day in said precinct number eight instead of the poll books and certificate thereof, the poll books and certificate of said precinct and the ballot-box thereof having been purloined and taken away from the custody and possession of said board during the time the said board was canvassing the returns of said general election, and the evidence of the result of said election in said precinct before said board was said certificate.

And your relators further show to the court that thereupon, the said board of county commissioners, sitting as a board of canvassers as aforesaid, then neglecting and refusing to canvass the returns of the said before-mentioned precinct, one Benjamin M. Read, a resident and qualified voter of Santa Fé county, on the 12th day of November, A. D. 1890, filed in the office of the clerk of this court his petition for a writ of mandamus upon said board of commissioners requiring said board to count and certify such returns, including the certificate of said precinct number eight of said county.

And your relators further state and show that after due hearing had upon the issue of said writ, on the 18th day of November, 1890, a peremptory writ of mandamus issued out of this court, directed to the said John H. Sloan, Teodoro Martinez, and George L. Wyllys, requiring them immediately upon the receipt of which writ to meet as a board of canvassers and proceed to canvass the returns of election from said precincts number one, two, sixteen, and eight, including said certificate from precinct number eight of said county.

And your relators further show unto your honor that the said George L. Wyllys, one of the members of said board, made return to said peremptory writ, stating that he was willing to meet and canvass said return in accordance with the said writ, but the said John H. Sloan and the said Teodoro Martinez then and there refused to obey the writ issued as aforesaid out of this honorable court; whereupon the said John H. Sloan and the said Teodoro Martinez were committed for contempt of court until such a time as they should meet and canvass said returns as in said writ
8 of mandamus required.

And your relators further show unto your honor that afterwards the said John H. Sloan and the said Teodoro Martinez, having been incarcerated in the county jail of said county in accordance with the order of this honorable court, were released therefrom by an alleged writ of *habeas corpus* issued by three justices of the peace of the said county of Santa Fé without jurisdiction or lawful authority.

And your relators further show unto your honor that afterwards the said John H. Sloan, chairman of said board, appeared before this honorable court and stated his willingness to obey said writ, and did then and there, as such chairman, together with the clerk of said board, one Marcelino Garcia, issued a notice to the said

George L. Wyllys and Teodoro Martinez to meet on a day fixed in said notice with him as a board of canvassers and canvass said returns, as in said writ of mandamus required; but your relators state upon information and belief that the said notice was given by the said John H. Sloan evasively, colorably, collusively, and without any intention on his part or on the part of the said George L. Wyllys or the said Teodoro Martinez to obey in any respect the commands and requirements of the said writ, and at that time or shortly thereafter the said George L. Wyllys and the said Teodoro Martinez, absolutely rejecting and abandoning their said offices, absconded and put themselves out of the reach of lawful process; whereupon, because of the vacancies created by such abandonment and rejecting of functions, Benjamin M. Thomas, then acting Governor of the Territory of New Mexico, on the 5th day of December, A. D. 1890, did then and there appoint and commissioned George W. North and Frederick Grace to fill the vacancies in said board caused by the abandonment of their offices by the said George L. Wyllys and Teodoro Martinez.

And your relators further show unto your honor that afterwards, on the — of December, A. D. 1890, the said George W. North and the said Frederick Grace took the oath of office and duly qualified as such members of the board of county commissioners of said county and filed their respective bonds, as required by law, and entered upon their duties as members of said board.

And your relators further show and state to your honor that afterwards, to wit, on the — day of December, A. D. 1890, pursuant to an order of this honorable court commanding them so to do, the said board of county commissioners, consisting of the said John H. Sloan, chairman; George W. North, and Frederick Grace, met as a board of canvassers for the purpose of canvassing said election returns, in accordance with the requirements of said peremptory writ of mandamus, at the court-house of said county.

And your relators further state and show to the court that the said John H. Sloan, chairman, when said board met as aforesaid then and there refused to canvass the returns of said election, as by said writ of mandamus he was required to do, except that he joined in the canvass of the said certificate from precinct number eight of said county; whereupon the said George W. North and the said Frederick Grace, sitting as a board of canvassers and duly recognized as such by Marcelino Garcia, clerk of said board, proceeded to canvass and did canvass all the returns of said election, including the return from said precinct numbers one, two, sixteen, and eight, including the judges' certificate from precinct number eight as aforesaid, and

9 then and there the said board of county commissioners, sitting as a board of canvassers, declared the result of said election as shown by said returns and made return of their action in the premises, in accordance with the said writ of mandamus, to this honorable court.

And your relators further show to the court here that the said board of county commissioners, sitting as a board of canvassers as aforesaid, issued certificates of election to your relators Juan Garcia

and William H. Nesbitt, certifying, in accordance with the statute and in accordance with the facts shown by said returns, that they and each of them had received a majority of all the votes of legal and qualified voters cast at said election for the office of county commissioners as aforesaid.

And your relators further state and show to the court that it appearing to said board of canvassers on said day when said returns were canvassed in accordance with the requirements of said writ of mandamus that the said Abraham Staab and the said Charles M. Creamer had received an equal number of votes for the said office of county commissioner and that a tie existed for said office, upon the suggestion of the said Charles M. Creamer, who was then and there present, as your relators are informed and believe, and according to the statute governing such cases, lots were cast by the said board of canvassers, which casting of lots resulted favorably to Abraham Staab. Whereupon he was duly declared elected to said office of county commissioner and duly received said certificate of election therefor.

And your relators further state and show to your honor that among the candidates voted for at the said election was one Pedro Delgado, who was a candidate for the office of probate clerk of said county, and that on the day when said returns were canvassed, pursuant to the said writ of mandamus, it appeared that the said Pedro Delgado had received a majority of all the votes cast at the said election by legal and qualified voters for the said office of probate clerk of said county; and thereupon the said board of canvassers duly declared him elected to said office and issued to him a certificate therefor.

And your relators further show and state to the court that on the 2nd day of January, A. D. 1891, your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, the duly elected board of county commissioners of said county, having first had approved by this honorable court their official bonds in the sum of five thousand dollars, took the oath of office and met in the court-house of said county of Santa Fé and duly organized by electing your relator Abraham Staab chairman of said board.

And your relators further state and show to your honor that thereupon the said Abraham Staab, chairman of the said board of county commissioners, then and there called upon and asked the said Pedro Delgado, probate clerk as aforesaid, then and there acting as said clerk and in possession of the records, books, files, and papers of his office, to act as clerk of said board, as by law he is required to do, and then and there asked and called upon the said Pedro Delgado, probate clerk, to produce the books in which are kept the records of the meetings and proceedings of the board of county commissioners of the county of Santa Fé, which said books were then and there in his possession and custody, and then and there to keep the records of the meeting then and there being held and record the same in the record of meetings and proceedings of the board of county commissioners of said county.

And your relators further state and show unto your honor that

then and there the said Pedro Delgado, probate clerk and *ex*
10 *officio* clerk of the board of county commissioners of said county, neglected and refused and still does neglect and refuse to produce said records and to act as clerk of said board and record the minutes of said meeting so held on the 2nd day of January, A. D. 1891, aforesaid, and refuses to recognize in any manner or act with your relators as such board of county commissioners.

Therefore your relators pray that the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, may be required by a writ of mandamus issuing out of this honorable court to produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county, and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, A. D. 1891, and to record in said records of minutes and proceedings the record of minutes and proceedings of all of the meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of the said board which hereafter may be had, and that in doing so he act as *ex officio* clerk of the board of county commissioners, of which said board your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, are members, and that he act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all the resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board, if required by any member; that he sign all orders issued by the board for the payment of money, and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he do recognize said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the lawful board of county commissioners of said county, and that he do furnish to said board all the books, records, files, and papers of his said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons except as the law may require him to do for the inspection and information of private individuals.

11 Now, therefore, you, the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, are hereby commanded that immediately after the receipt of this writ you produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county and to record therein

the records of the meetings of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all of the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board if required by any member; that you sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that you do recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of Santa Fé county, and that you do furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them or any other person or persons, except as the law may require you to do, for the inspection and information of private individuals, or that you show cause before the first judicial district court of the Territory of New Mexico in and for the county of Santa Fé, at chambers, in the Federal building, in the city of Santa Fé, New Mexico, on Wednesday, January 14th, 1891, at 9 o'clock a. m., why you have not done so; and that you then and there return this writ, with your certificate of having done as you are hereby commanded.

[SEAL.] Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, and the seal of said district court this 13th day of January, 1891.

A. E. WALKER, *Clerk.*

I hereby allow the foregoing writ, designate Wednesday, January 14th, 1891, at 9 o'clock a. m., as the return day thereof, and direct that service thereof be made by delivering a copy of said writ to the said Pedro Delgado.

EDWARD P. SEEDS,
Associate Justice, &c.

And the said alternative writ of mandamus having been served upon this petitioner in pursuance of the order of said judge, this petitioner, in obedience to the commands of said writ, on the 15th day of January, A. D. 1891, appeared before said judge, and for the purpose of showing why a peremptory writ of mandamus should not be issued, commanding and requiring him to do and perform the things required and commanded by said alternative writ of mandamus, he filed and presented to said judge his duly verified answer; which answer was in the words and figures following, to wit:

12 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of Santa Fé County.

THE TERRITORY OF NEW MEXICO on the Relation of ABRAHAM STAAB and Others
v.
PEDRO DELGADO.
} Mandamus. No. 2838.

The above-named defendant, Pedro Delgado, now and at all times hereafter reserving unto himself all manner of objections and exceptions to the many uncertainties, imperfections, and insufficiencies in the alternative writ of mandamus issued in the above-named cause, for answer thereto or so much thereof as he is informed and advised that is necessary for him to make answer unto, answers and says that he admits that at the general election held in the said county of Santa Fé on the 4th day of November, 1890, he, the said defendant, was duly elected clerk of the probate court of said county, and that on the first day of January, 1891, he, having duly qualified as such clerk, *and* entered upon the discharge of the duties of such office, and that he has continuously since said last-mentioned date been in the possession of such office and has been *ex officio* clerk of the board of county commissioners of said county and has had and held possession of the records and books which by law he is made the custodian of.

Said defendant admits that in the month of November, 1890, and for a long time prior thereto, and until the first day of January, 1891, George L. Wyllys, Teodoro Martinez, and John H. Sloan were the legally elected and lawfully acting members of the board of county commissioners of the county of Santa Fé, in said Territory; but he denies that the said Wyllys and Martinez or either of them were ever removed from their said offices or that the office held by either of said persons became vacant prior to the expiration of their terms, to wit, on the first day of January, 1891; and he denies that either of the said persons abandoned their said offices or that they or either of them refused to perform the duties and functions thereof, and he denies that George W. North and Frederick Grace or any other persons were ever legally appointed by the acting Governor of the Territory of New Mexico or any other person as members of the board of county commissioners of said county, or that they or either of them ever had any power or authority to perform the

duties or exercise the functions of said offices; and this defendant avers the fact to be that on the 4th day of November, 1890, and for many months prior thereto, and continuously until the first day of January, 1891, John H. Sloan, George L. Wyllys, and Teodoro Martinez were the duly elected and qualified members of the board of county commissioners in and for the county of Santa Fé, in said Territory, and that they, each and all of them, continued to hold such office and were in the actual possession thereof and performing all the duties and functions of said offices during all of the year 1890 and up until the first day of January, 1891.

This defendant denies that at the election held in the county of Santa Fé on the 4th day of November, 1890, Abraham Staab, Juan Garcia, and William H. Nesbitt or either of them were elected as members of the board of county commissioners of said Santa Fé county; and he denies that the said Staab, Garcia, and Nesbitt ever obtained or that they now have or hold any certificates showing that they or either of them was at said election elected as members of the board of commissioners of said county; and said defendant also denies that the said Abraham Staab, Juan Garcia, and William H. Nesbitt or either of them have ever qualified as members of said board of commissioners, and he denies that the said Staab, Garcia, and Nesbitt or either of them have by virtue of any such election had or held possession of the office of a member of the board of county commissioners of said county, in that they or either of them have held any session as members of said board of county commissioners by virtue of such election, nor have they or either of them by virtue of such election performed and of the duties pertaining to such office, but he alleges the fact to be that at the general election held in and for said county of Santa Fé, in said Territory, on
13 the 4th day of November, 1890, George L. Wyllys, Charles M. Creamer, and Higinio Martinez were each duly elected as members of the board of commissioners in and for the county of Santa Fé and Territory of New Mexico, the said Wyllys, Creamer, and Martinez receiving at said election the greatest number of legal votes cast at said election in said county for said offices of county commissioners for said county, and after said election returns thereof were made as required by law and the board of county commissioners then in office for said county met as a canvassing board of election for said county and duly counted and canvassed all the votes cast in the several precincts in said county at said election, returns of which were before said board, and after counting and canvassing said votes and returns the said board of commissioners, as such canvassing board, ascertained that the said George L. Wyllys, Charles M. Creamer, and Higinio Martinez had been and were duly elected as members of the board of county commissioners for said county of Santa Fé at said election, all of which was duly entered of the record, and thereupon said board of commissioners, as such canvassing board, issued, under their hands and the seal of said board, certificates to said Wyllys, Creamer, and Martinez, setting forth that they had been duly elected at said election as members of the board of county commissioners of said county of Santa Fé;

which said certificates were duly attested by the probate clerk of said county; and afterwards, to wit, on the first day of January, A. D. 1891, the said Charles M. Creamer and Higinio Martinez, each having duly qualified as members of the board of county commissioners of said county of Santa Fé, *they* entered into possession of and assumed the duties of their said offices and met together in the court-house of said county, in the city of Santa Fé, as the board of county commissioners of said county, and proceeded to transact business as such, and the said Creamer and Martinez have continuously from said first day of January, 1891, had and held possession of said offices, and at the present time and at the date of the issuing of the alternative writ of mandamus in this action the said Creamer and Martinez were and are holding and in the possession of said offices, and are now and have at all times since the first day of January, 1891, been the legal acting members of the board for said county of Santa Fé and have during all of said time been transacting the public business of said county as such commissioners.

Said defendant states that he is not informed as to what acts or proceedings were done or had by one Frederick Grace and one George W. North, pretending to act as members of the board of county commissioners, in reference to the counting and canvassing the returns of election of the general election held in said county on the 4th day of November, 1890, but he states whatever they may have done in that respect was wholly illegal and of no effect, for said Grace and North were not at the time of their said pretended action and the counting and canvassing of said votes members of the board of commissioners of said county of Santa Fé.

Said defendant admits that he has refused to recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as members of the board of commissioners of said Santa Fé county for the reason that they have never been elected and qualified as such officers, and because they have not been in the possession of said offices and have never acted as members of such board, and denies that said Staab, Garcia, and Nesbitt have ever met as such board or held any session as such, as set forth in the alternative writ of mandate herein; but he says that since the first day of January, 1891, Charles M. Creamer and Higinio Martinez have been the legal and acting board of commissioners of said county.

As to all the allegations and statements set forth in said alternative writ not herein expressly admitted or denied, the said defendant states that he has not sufficient information upon which to form a belief, and he therefore denies all of said allegations.

Pedro Delgado, being duly sworn, upon his oath states that the facts set forth in the foregoing answer are true to his best knowledge, information, and belief.

PEDRO DELGADO.

Subscribed and sworn to before me this 15th day of January, 1891.

N. B. LAUGHLIN,
Notary Public.

[Endorsed:] No. 2838. District court, Santa Fé county. The Territory *ex rel.* Abraham Staab *et al. v.* Pedro Delgado. Mandamus. Answer to alternative writ. Filed in my office this Jan. 15, 1891. A. E. Walker, clerk.

14 And afterwards, on the 15th day of January, A. D. 1891, the said matter coming on to be heard, and, after hearing the arguments of counsel and having considered the application for a peremptory writ of mandamus, said judge made and entered a certain order, which is in the words and figures following, to wit:

In the District Court, First Judicial District, Santa Fé County.

TERRITORY OF NEW MEXICO *ex Rel.* ABRAHAM STAAB, JUAN GARCIA, and WILLIAM H. NESBITT *vs.* PEDRO DELGADO, Probate Clerk of the County of Santa Fé and *ex Officio* Clerk of the Board of County Commissioners of Santa Fé County.	2838. Mandamus.

This proceeding coming on to be heard on this 15th day of January, A. D. 1891, upon the alternative writ of mandamus heretofore allowed herein, the answer of said respondent thereto, and the motion of the relators for a peremptory writ of mandamus herein, and being argued by R. E. Twitchell, district attorney; E. L. Bartlett, solicitor general, and F. W. Clancy, Esq., in behalf of said relators, and Francis Downs and N. B. Laughlin, Esqs., in behalf of said respondent, and submitted to the court, the court, being sufficiently advised in the premises, grants the said motion.

It is therefore considered, ordered, and adjudged by the court that a peremptory writ of mandamus, requiring the said respondent immediately after the receipt of this writ to produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in the said records of minutes and proceedings the records of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and requiring said respondent to act as *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that he act with no other person whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board if required by any member; that he be required to sign all orders issued by the said board for the payment of money, and record in a book provided for that purpose the receipt of the

county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county, in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that he furnish to said board all the books, records, files, and papers of the said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons, except as the law may require him to do, for the inspection and information of private individuals, be, and the same hereby is, allowed; and that said writ be returned before this court on Saturday, January 17th, 1891, by 2 o'clock p. m. of said day, with the certificate of said respondent that he has done as by said writ commanded.

Santa Fé, New Mexico, January 15th, 1891.

EDWARD P. SEEDS,
Associate Justice, &c.

[Endorsed:] No. 2838. Santa Fé county. The Territory *ex rel.* Abraham Staab *et al. vs.* Pedro Delgado, probate clerk, &c. Order for peremptory writ. Filed in my office this Jan. 15, 1891. A. E. Walker, clerk.

15 And afterwards, on the 15th day of January, A. D. 1891, the clerk of said district court, in pursuance of the order made by said judge as aforesaid, issued a peremptory writ of mandamus, directed to the petitioner; which said writ was in the words and figures following, to wit:

THE TERRITORY OF NEW MEXICO:

To Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of Santa Fé county, Greeting:

Whereas it appearing to our district court in and for the county of Santa Fé, Territory of New Mexico, on the information of Abraham Staab, Juan Garcia, and William H. Nesbitt, residents and qualified voters of the county of Santa Fé, in said Territory, that on the 4th day of November, A. D. 1890, pursuant to the laws of the Territory of New Mexico governing the same, there was held an election, at which, among others, candidates for the office of county commissioner from the first, second, and third districts of said county of Santa Fé were voted for; that at said election said relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, were respectively candidates for the office of county commissioner from the said first, second, and third districts respectively, and each re-

ceived a majority of all the votes of legal and qualified voters cast at said election for said office of county commissioner over their opponents respectively, Charles M. Creamer, Higinio Martinez, and George L. Wyllys, with the exception of said relator, Abraham Staab, who received the same number of votes of legal and qualified voters voting at said election for the office of county commissioner from the first district of said county as did his opponent, Charles M. Creamer; that afterwards, to wit, on the — day of November, A. D. 1890, John H. Sloan, Teodoro Martinez, and George L. Wyllys, then members of the board of county commissioners of said county of Santa Fé, met at the court-house of said county, and, sitting as a canvassing board for the purpose of canvassing the returns of the said general election held in said county and Territory on the 4th day of November, A. D. 1890, proceeded to canvass the returns of the said general election so held as aforesaid, but then and there neglected and refused to canvass the returns from all of the precincts of said county in which the said election was held, according to the laws of this Territory, the said John H. Sloan, Teodoro Martinez, and George L. Wyllys, sitting as a canvassing board as aforesaid, then and there refusing and neglecting to count the returns of said election from precincts numbers one, two, sixteen, and eight of said county, the returns from which several precincts were before said board, there being included as part of said returns a certificate of two of the judges and both clerks of election of precinct number eight of said county, under section 1196 of the Compiled Laws of 1884 and following sections, which said certificate showed the true result of the election held on said day in said precinct number eight, instead of the poll books and certificate thereof, the poll books and certificate of said precinct and the ballot-box thereof having been purloined and taken away from the custody and possession of said board during the time the said board was canvassing the returns of said general election, and the evidence of the result of said election in said precinct before said board was said certificate; that thereupon the said board of county commissioners, sitting as a board of canvassers as aforesaid, then neglecting and refusing to canvass the returns of said before-mentioned precints, one Benjamin M. Read, a resident and qualified voter of Santa Fé county, on the 12th day of November, A. D. 1890, filed in the office of the clerk of this court his petition for a writ of mandamus upon said board of county commissioners, requiring said board to count and certify such returns, including the certificate from the said precinct numbered eight, of said county; that after due hearing had upon the is-ue of said writ, on the 18th day of November, A. D. 1890, a peremptory writ of mandamus issued out of this court, directed to the said John H. Sloan, Teodoro Martinez, and George L. Willis, requiring them immediately upon the receipt of which writ to meet, as a board of canvassers, and proceed to canvass the returns of election from said precincts numbered one, two, sixteen, and eight, including said certificate from precinct number eight, of said county; that the said George L. Wyllys, one of the members of said board, made return to said peremptory writ, stating that he was willing

to meet and canvass such returns in accordance with said writ, but the said John H. Sloan and the said Teodoro Martinez then and there refused to obey the writ issued as aforesaid out of this honorable court; whereupon the said John H. Sloan
16 and the said Teodoro Martinez were committed for contempt of court until such a time as they should meet and canvass said returns as in said writ of mandamus required; that afterwards the said John H. Sloan and the said Teodoro Martinez, having been incarcerated in the county jail of said county in accordance with the order of this honorable court, were released therefrom by an alleged writ of *habeas corpus* issued by three justices of the peace of the said county of Santa Fé without jurisdiction or lawful authority; that afterwards the said John H. Sloan, chairman of said board, appeared before this honorable court and stated his willingness to obey said writ, and did then and there, as such chairman, together with the clerk of said board, one Marcelino Garcia, issue a notice to the said George L. Wyllys and Teodoro Martinez to meet, on a day fixed in said notice, with him as a board of canvassers and canvass said returns as in said writ of mandamus required; but said relators state, upon information and belief, that the said notice was given by the said John H. Sloan evasively, colorably and collusively, and without any intention on his part or on the part of the said George L. Wyllys or the said Teodoro Martinez to obey in any respect the commands and requirements of the said writ, and at that time or shortly thereafter the said George L. Wyllys and the said Teodoro Martinez, absolutely rejecting and abandoning their said office, absconded and put themselves out of the reach of lawful process; whereupon, because of the vacancies created by such abandonment and rejection of functions, Benjamin M. Thomas, then acting Governor of the Territory of New Mexico, on the 5th day of December, A. D. 1890, did then and there appoint and commission George W. North and Frederick Grace to fill the vacancies in said board caused by the abandonment of their offices by the said George L. Wyllys and Teodoro Martinez; that afterwards, on the — day of December, A. D. 1890, the said George W. North and the said Frederick Grace took the oath of office and duly qualified as such members of the board of county commissioners of said county, and filed their respective bonds, as required by law, and entered upon their duties as members of said board; that afterwards, to wit, on the — day of December, A. D. 1890, pursuant to an order of this honorable court commanding them so to do, the said board of county commissioners, consisting of the said John H. Sloan, chairman; George W. North, and Frederick Grace, met as a board of canvassers for the purpose of canvassing said election returns, in accordance with the requirements of said peremptory writ of mandamus, at the court-house of said county; that the said John H. Sloan, chairman, when said board met as aforesaid, then and there refused to canvass the returns of said election, as by said writ of mandamus he was required to do, except that he joined in the canvass of the said certificate from said precinct number eight of said county; whereupon the said George W. North and the said Frederick Grace, sitting as a board of can-

vassers and duly recognized as such by Marcelino Garcia, clerk of said board, proceeded to canvass and did canvass all of the returns of said election, including the returns from the said precincts numbers one, two, sixteen, and eight, including the judges' certificate from precinct number eight as aforesaid, and then and there the said board of county commissioners, sitting as a board of canvassers, declared the result of said election as shown by said returns, and made return of their action in the premises in accordance with said writ of mandamus to this honorable court; that the said board of county commissioners, sitting as a board of canvassers as aforesaid, issued certificates of election to said relators, Juan Garcia and William H. Nesbitt, certifying, in accordance with the statute and according to the facts shown by said returns, that they and each of them had received a majority of all the votes of legal and qualified voters cast at said election for the office of county commissioner as aforesaid; that it appearing to said board of canvassers on the said day when said returns were canvassed in accordance with the requirements of said writ of mandamus that the said Abraham Staab and the said Charles M. Creamer had received an equal number of votes for the said office of county commissioner, and that a tie existed for said office, upon the suggestion of the said Charles M. Creamer, who was then and there present, as said relators are informed and believe, and according to the statute governing such cases, lots were cast by the said board of canvassers, which casting of lots resulted favorably to Abraham Staab; whereupon he was duly declared elected to said office of county commissioner and duly received his certificate of election therefor;

17 That among the candidates voted for at said election was you, the said Pedro Delgado, who was a candidate for the office of probate clerk of said county, and that on the day when said returns were canvassed, pursuant to the said writ of mandamus, it appeared that you, the said Pedro Delgado, had received a majority of all the votes cast at said election by legal and qualified voters for the said office of probate clerk of said county, and thereupon the said board of canvassers duly declared you elected to said office and issued to you a certificate therefor;

That on the 2nd day of January, A. D. 1891, said relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, the duly elected board of county commissioners of said county, having first had approved by this honorable court their official bonds in the sum of five thousand dollars, took the oath of office and met in the court-house of said county of Santa Fé, and duly organized by electing said relator, Abraham Staab, chairman of said board;

That thereupon the said Abraham Staab, chairman of said board of county commissioners, then and there called upon and asked you, the said Pedro Delgado, probate clerk as aforesaid, then and there acting as said clerk and in possession of the records, books, files, and papers of your said office, to act as clerk of said board, as by law you are required to do, and then and there asked and called upon you, the said Pedro Delgado, probate clerk, to produce the books in which are kept the records of the meetings and proceedings of the

board of county commissioners of the county of Santa Fé, which said books were then and there in your possession and custody, and then and there to keep the records of the meeting then and there being held and record the same in the record of meetings and proceedings of the board of county commissioners of said county;

That then and there you, the said Pedro Delgado, probate clerk and *ex officio* clerk of the board of county commissioners of said county, neglected and refused and still do neglect and refuse to produce said records and to act as clerk of said board and record the minutes of said meeting so held on the 2nd day of January, A. D. 1891, aforesaid, and refused to recognize in any manner or act with said relators as such board of county commissioners;

And whereas, on the thirteenth day of January, 1891, an alternative writ of mandamus was issued out of this court, requiring you immediately after the receipt of the said writ that you produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county, and that you record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board if required by any member; that you sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that you do recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that you do furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them to any other person or persons except as the law may require you to do for the inspection and information of private individuals, or that you show cause before the first judicial district court of the Territory of New Mexico in and for the county of Santa Fé,

at chambers, in the Federal building, in the city of Santa Fé, New Mexico, on Wednesday, January 14th, 1891, at 9 o'clock a. m., why you had not done so;

18 And whereas you appeared before the said district court on this 15th day of January, 1891, and made return to said writ; whereupon the said district court on said 15th day of January heard arguments for the said relators and counsel for you, the said respondent, and, being sufficiently advised in the premises, considered and determined that this peremptory writ of mandamus should be allowed:

Now, therefore, you, the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, are hereby commanded that immediately after the receipt of this writ you produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county, and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board if required by any member; that you sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fé county, and that you recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that you do furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them to any other person or persons except as the law may require you to do for the inspection and information of private individuals, and that you return this writ to this court on Saturday, January 17th, 1891, by 2 o'clock p. m., with your certificate of having done as you are hereby commanded.

Hhereof fail not, under the penalty of the law.

Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge [SEAL.] of the first judicial district court thereof, and the seal of said district court this 15th day of January, 1891.

A. E. WALKER,
Clerk of said District Court.

I hereby allow the foregoing writ, designate Saturday, January 17th, 1891, at 2 o'clock p. m., as the return day thereof, and direct that service thereof be made by delivering a copy of said writ to the said Pedro Delgado.

EDWARD P. SEEDS,
Associate Justice, &c.

And afterwards, to wit, on the 19th day of January, A. D. 1891, there was filed and presented to said judge in said matter and proceedings the affidavit of William H. Nesbitt; which affidavit was in the words and figures following, to wit:

ABRAHAM STAAB, WILLIAM H. NESBITT, and JUAN GARCIA
versus
PEDRO DELGADO, Probate Clerk, etc.

In the District Court, County of Santa Fé, Territory of New Mexico.

The undersigned, William H. Nesbitt, one of the complain-
19 ants in the above-entitled cause, having first been duly sworn, upon his oath states to the court here the following, to wit:

The peremptory writ of mandamus heretofore granted in the above-entitled cause was duly served upon defendant, Pedro Delgado, on the 16th day of January, 1891, as will appear by the return of Francisco Chavez, sheriff, endorsed upon said writ, reference to which is hereby made, by which said writ of mandamus the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners, was commanded immediately after the receipt of said writ to produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, A. D. 1891, and record in said record of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also to record all the proceedings of said board which hereafter may be had, and that in doing so the said Pedro Delgado do act as the *ex officio* clerk of the board of county commissioners, of which said board Abraham Staab, William H. Nesbitt, and Juan Garcia are members, and that he act with no other persons whatever pretending to act as a board of county commissioners of the county of

Santa Fé, and that the said Pedro Delgado make regular entries of all their resolutions and decisions in all questions concerning the raising of money and to record the vote of each commissioner on any question submitted to the board, if required by any member, and that he sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and — he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, William H. Nesbitt, and Juan Garcia as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he recognize the said Staab, Garcia, and Nesbitt as the only lawful board of county commissioners of said county, and was commanded to furnish the said board all the books, records, files, and papers of his said office for the use, inspection, information, and government of the said Staab, Garcia, and Nesbitt in the discharge of their duties as the board of county commissioners of said county, and was commanded not to furnish them to any other person or persons except as the law may require him to do for the inspection and information of private individuals.

And the undersigned further states and shows that on Monday, the 19th day of January, 1891, he, together with Juan Garcia, member of the board of county commissioners of said county, met at the court-house of the county of Santa Fé, Abraham Staab being not present owing to sickness, and, upon motion, the undersigned was made chairman of the meeting of said board, and then and there the said board made demand upon the said Pedro Delgado to produce the books, papers, records, files, and papers of his office for the use, guidance, and information of the said board, and then and there made demand on said Pedro Delgado to act as clerk of said board, as commanded in said writ.

And the undersigned states and shows to the court that the said Pedro Delgado, defendant, wholly disregarded the said peremptory writ of mandamus heretofore issued as aforesaid and now contemptuously defies and holds for naught the order of this honorable court, and refuses to obey the said writ of mandamus, and refuses to act with the said board of county commissioners of Santa Fé county, and refuses to record the minutes of the meeting so held as aforesaid, as well as refuses to record the minutes of the meetings of said board heretofore held, and refuses to produce to said board for its use, guidance, information, and government the books, papers, files, records, and other papers of his office.

Wherefore the undersigned prays this honorable court to cause attachment to issue for the arrest of the said Pedro Delgado for contempt in disobeying said peremptory writ of mandamus, and that the said Pedro Delgado be brought forthwith before this honorable court, at the Federal building, in the county of Santa Fé, then and there to answer in the premises.

WILLIAM H. NESBITT.

Subscribed and sworn to before me this 19th day of January, A. D. 1891.

A. E. WALKER, *Clerk.*

20 Cause attachment to issue for the arrest of the within Pedro Delgado and the return thereon be made by 5 o'c. p. m. of this 19th day of January, 1891.

EDWARD P. SEEDS,
[SEAL.] *Associate Justice.*

[Endorsed:] No. 2838. Territory *ex rel.* A. Staab *et al. vs.* Pedro Delgado. Affidavit and petition of W. H. Nesbitt. Filed in my office this Jan. 19, 1891. A. E. Walker, clerk.

And afterwards, to wit, on the 19th day of January, A. D. 1891, the said judge, having read and considered said affidavit, made and entered a certain order, which order is in the words and figures following, to wit:

In the District — of Santa Fé County, at Chambers, in Vacation.

TERRITORY OF NEW MEXICO
vs.
PEDRO DELGADO. } 2521. Contempt.

It being shown to the court by the petition and affidavit of William H. Nesbitt filed this 19th day of January, 1891, in the cause lately pending in said district court, in which Abraham Staab, Juan Garcia, and William H. Nesbitt were relators and Pedro Delgado was respondent, that the said defendant, Pedro Delgado, has refused and still does refuse to obey the peremptory writ of mandamus issued out of this court in said mandamus proceeding on the 15th day of January, 1891, it is ordered by the court that an attachment for contempt, returnable at 5 o'clock this afternoon, issue for the arrest of said defendant, Pedro Delgado.

Santa Fé, New Mexico, January 19, 1891.

EDWARD P. SEEDS,
Associate Justice, &c.

[Endorsed:] No. 2521. Territory *ex rel.* Staab *et al. vs.* Pedro Delgado. Order for attachment for contempt. Filed in my office this Jan. 19, 1891. A. E. Walker, clerk.

And afterwards, to wit, on the 19th day of January, A. D. 1891, the clerk of said district court, in pursuance of the said order made and entered by said judge as aforesaid, issued to the sheriff of Santa Fé county a writ of attachment directing such sheriff to take the body of this petitioner and safely keep him and have his body before the said district court and said judge at five o'clock p. m. on the 19th day of January, 1891; which said writ of attachment and return thereon is in the words and figures following, to wit:

The Territory of New Mexico to the sheriff of Santa Fé county, Greeting:

You are hereby commended to arrest and take the body of Pedro Delgado and him safely keep, so that you have his body before the district court within and for the county of Santa Fé, sitting at chambers, in the Federal building, in said county, at five o'clock in the afternoon of Monday, January 19th, 1891, then and there to answer unto a charge for contempt.

Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, and the seal of said district court this 19th day of January, 1891.

[SEAL.] A. E. WALKER, *Clerk.*

[Endorsed:] No. 2521. Contempt in No. 2838. District court, county of Santa Fé. Territory of New Mexico *vs.* Pedro Delgado. Warrant, returnable forthwith. Filed in my office this Jan. 19, 1891. A. E. Walker, clerk.

I do hereby certify that I served the within warrant on Pedro Delgado by arresting his body at Santa Fé this 19th day of January, 1891, and presented him before his honor E. P. Seeds at the chambers, in the Federal building, the same day.

FRANCISCO CHAVEZ, *Sheriff.*

21 And afterwards, to wit, on the 20th day of January, A. D. 1891, your petitioner having been taken before said judge in vacation and not during a term of said district court, the said judge proceeded to hear and try your petitioner as for a contempt for not complying with the commands of said peremptory writ of mandamus, and after having read the said affidavit of said William H. Nesbitt the said judge, so in vacation as aforesaid, made and entered an order directing that this petitioner should be committed to the common jail of Santa Fé county until he should comply with the commands of said writ; which said order was and is in the words and figures following, to wit:

In the District Court of Santa Fé County, at Chambers, in Vacation.

TERRITORY OF NEW MEXICO *vs.* PEDRO DELGADO. } 2521. Contempt.

A peremptory writ of mandamus having been allowed by this court on January 15th, 1891, in a proceeding then pending therein in which Abraham Staab, Juan Garcia, and William H. Nesbitt were relators and Pedro Delgado was respondent, by which said writ the said respondent, as probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, was directed, after the receipt of said writ, to produce the books in which are kept the records of meetings and proceedings of

the board of county commissioners of Santa Fé county and to record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so he act as the *ex officio* clerk of the board of county commissioners, of which said board Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that he act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board, if required by any member; that he sign all orders issued by the said board for the payment of money, and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that he furnish to said board all the books, records, files, and papers of his said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons except as the law may require him to do for the inspection and information of private individuals, said writ having been allowed after a full hearing of counsel for said relators and for said respondent and after due deliberation by the court, and being returnable on Saturday, January 17th, 1891, by two o'clock p. m.; and there having been filed in the office of the clerk of said court, on the 19th day of January, 1891, the affidavit and petition of the said William H. Nesbitt, setting forth that the said Pedro Delgado had refused to obey the said peremptory writ of mandamus heretofore issued as aforesaid, and praying that an attachment issue out of said court for the arrest of said Pedro Delgado for contempt—

And this court, upon reading the affidavit and petition of the said William H. Nesbitt, ordered an attachment to issue for the arrest of said respondent for contempt in disobeying the said peremptory writ of mandamus by not doing as by said writ commanded, and the said Pedro Delgado being now brought before the said court in his own proper person by the sheriff of Santa Fé county, and being attended by counsel, and still refusing to obey the said peremptory writ, and saying nothing in excuse for his said refusal and disobedience:

22 It is considered and adjudged by the court that said defendant, Pedro Delgado, is guilty of contempt of this court in refusing to obey and in disobeying the commands of said writ of mandamus; and it is further adjudged by the court that said Pedro Delgado stand committed to the common jail of Santa Fé county until he purge himself of such contempt, and that a warrant of commitment issue against him.

Santa Fé, New Mexico, January 20th, 1891.

EDWARD P. SEEDS,
Associate Justice, &c.

And afterwards, to wit, on said 20th day of January, 1891, in pursuance of the said order, so made and entered by said judge of said court as aforesaid, the clerk of said court issued a writ of commitment, directed to the sheriff of Santa Fé county, New Mexico, commanding him to take and confine the body of said Pedro Delgado, your petitioner, in the common jail of said county until such time as he should purge himself of contempt of said judge and until the further order of said court; and your petitioner avers and states that said writ of commitment was delivered to Francisco Chavez, the sheriff of said Santa Fé county, and in pursuance of the commands of said writ said sheriff took the body and person of this petitioner into custody and placed him and confined him in the common jail of said county, where the said sheriff now confines, imprisons, and restrains this petitioner of his liberty; and the said writ of commitment so issued to said sheriff as aforesaid and under which this petitioner is confined, imprisoned, and restrained is in the words and figures following, to wit:

THE TERRITORY OF NEW MEXICO:

To Francisco Chavez, sheriff of Santa Fé county, Greeting:

Whereas on the 15th day of January, 1891, a peremptory writ of mandamus was issued by the district court of Santa Fé county requiring that Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, should, immediately after the receipt of said writ, produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county and record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so he act as the *ex officio* clerk of the board of county commissioners, of which said board Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that he act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all the

resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board if required by any member; that he sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that he furnish to said board all the books, records, files, and papers of his said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons except as the law may require him to do for the inspection and information of private individuals, which said writ was returnable before the said district court on Saturday, January 17th, 1891, by 2 o'clock p. m. of said day;

And whereas there was filed in the office of the clerk of said district court on the 19th day of January, 1891, the affidavit and petition of the said William H. Nesbitt, setting forth that the said Pedro Delgado refused to obey the said writ of mandamus heretofore issued as aforesaid, and praying that an attachment issue out of this court for the arrest of said Pedro Delgado for contempt;

23 Whereupon such proceedings were had by the said court that on January 20th, 1891, after a warrant had been issued by said court against the said Pedro Delgado, and after the body of the said Pedro Delgado had been presented before the said court by you, the said sheriff, he being accompanied by counsel, and after hearing what the said Pedro Delgado had to offer in excuse for not having obeyed the said peremptory writ of mandamus, and after his further refusal to obey the said peremptory writ of mandamus, that the said Pedro Delgado was adjudged guilty of contempt and ordered to be confined in close custody in the county jail of said county of Santa Fé until such time as he shall purge himself of the said contempt:

Now, therefore, you, the said sheriff of Santa Fé county, are hereby commanded that you immediately take the said Pedro Delgado into your custody, and that you safely and securely confine the said Pedro Delgado in said common jail of Santa Fé county until the further order of the court in the premises, and this writ shall be your sufficient warrant for so doing.

Hereof fail not, under the penalty of the law.

Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, and the seal of said district court this 20th day of January, A. D. 1891.

A. E. WALKER,
Clerk of said District Court.

And the said petitioner, Pedro Delgado, states and avers that his said confinement, imprisonment, and restraint is wrongful, unlawful, illegal, and without authority of law for the reasons hereinafter set forth, viz:

1. Because it is shown by the application and petition filed with said judge for the purpose of obtaining a writ of mandamus against this petitioner, and upon which said writ was issued, that such petition was filed and such mandamus sought for the purpose of contesting the election of certain persons named in said petition, viz., Charles M. Creamer and Higinio Martinez, and who were not made parties to such petition, to the offices of members of the board of county commissioners of Santa Fé county, and for the reason that the said judge of said district court was without power, authority, or jurisdiction to hear and determine such an issue upon an application for a wri- of mandamus.

2. Because the said judge of the said district court did not have jurisdiction over the subject-matter set forth in said petition and application for a writ of mandamus, and because he had no power, authority, or juris-iction to issue either said alternative or peremptory writs of mandamus.

3. Because by the answer filed by this petitioner to said alternative writ of mandamus, the truth of said answer being in no respect controverted or denied, it is shown and set forth that at the time of the issuing of said al-ernative writ and a long time prior thereto Charles M. Creamer and Higinio Martinez had been elected members of the board of commissioners of said county of Santa Fé and had qualified as such officers and had taken possession of such offices and had been exercising and discharging the duties thereof, and that at the time of the issuing of said al-ernative writ said Creamer and Martinez were in the actual possession of said offices and were discharging the duties and functions thereof, and the said judge had no power, authority, or jurisdiction to compel this petitioner, as the probate clerk of said county and *ex officio* clerk of the board of county commissioners thereof, by a writ of mandamus, to recognize and act with any other persons as members of said board of commissioners so long as said Creamer and Martinez were in the actual possession of said offices and were discharging the duties thereof.

4. Because the said judge of said district court, during vacation and when said court was not in session, had no power, authority, or jurisdiction to hear and try an application for a peremptory writ of mandamus and to order the issuing of said writ, and the said writ was and is wholly illegal and void.

5. Because the said judge of said district court had no power, authority, or jurisdiction to order and adjudge in vacation that this petitioner should be committed to jail for a failure to obey and comply with the commands of said peremptory writ of mandamus.

6. Because the said judge of said district court had no power, authority, or jurisdiction to adjudge and order that this petitioner should be committed to jail for a failure to obey and comply with the commands of said peremptory writ of mandamus, for the reason

that, under the laws of this Territory regulating the issuing
24 and enforcing of such writs, the only punishment that can be assessed for a refusal to comply with the commands of such a writ is a fine not exceeding two hundred and fifty dollars, as specified by — 2002 of the Compiled Laws of 1884.

Pedro Delgado, the above-named petitioner, being duly sworn, upon his oath states that the matters and facts set forth and stated in the foregoing petition are true in substance and in fact.

PEDRO DELGADO.

Subscribed and sworn to before me this 22nd day of January, A. D. 1891.

JUAN ORTIZ Y RODRIGUEZ,
Justice of the Peace, Prec. No. 4, Santa Fé Co., N. M.

Wherefore said petitioner prays that a writ of *habeas corpus* may be issued herein, directed to said Francisco Chavez, ordering him to produce your petitioner before this honorable court, to the end that said imprisonment and restraint may be inquired into, and if found illegal your petitioner may be discharged.

FRANCIS DOWNS,
N. B. LAUGHLIN,
Att'ys for Petitioner.

And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government of said Territory, on the first Monday of January, eighteen hundred and ninety-one, the same being Monday, January fifth, A. D. 1891, on the seventeenth day of said term, the same being Friday, January 23, 1891, the following, among other, proceedings were had, to wit:

In the Matter of the Application of PEDRO DELGADO for a Writ of *Habeas Corpus.* 462.

Now comes said petitioner, by his attorneys, Mr. Burns and Mr. Laughlin, and presents to the court here his petition for a writ of *habeas corpus;* and after hearing the said petition read it is ordered by the court that a writ of *habeas corpus* issue, directed to Francisco Chavez, sheriff of Santa Fé county, N. M., and returnable at 2 o'clock p. m. of to-day.

And afterwards, to wit, on said 23rd day of January, 1891, there was issued out of said clerk's office a writ of *habeas corpus;* which said writ is in the words and figures following, to wit:

The Territory of New Mexico to Francisco Chaves, sheriff of Santa Fé county, Greeting:

You are hereby commanded to have the body of Pedro Delgado, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said Pedro Delgado shall be called or charged, before

the supreme court of the Territory of New Mexico, at the hour of two o'clock p. m. of Friday, January 23rd, 1891, at the capitol building, in the city of Santa Fé, N. M., to do and receive what shall then and there be considered concerning the said Pedro Delgado; and have you then and there this writ.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court this 23rd day of January, 1891.

[SEAL.] SUMMERS BURKHART,
Clerk of said Supreme Court.

And afterwards, to wit, on said 23rd day of January, 1891, said writ of *habeas corpus* was returned into and filed in said clerk's office, with an indorsement thereon in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Jose Ortiz y Baca, of lawful age, being duly sworn, deposes and says that he served the within writ upon the within-named Francisco Chavez, sheriff, by delivering to him in person a true copy thereof at the county of Santa Fé aforesaid this 23rd day of January, 1891.

JOSE ORTIZ Y BACA.

Subscribed and sworn to before me this 23rd day of January, 1891.

JUAN ORTIZ Y RODRIGUEZ,
Justice of the Peace, P't No. 4, Santa Fé Co., N. M.

25 And afterwards, to wit, on the 23rd day of January, 1891, there was filed in the office of the clerk of said supreme court the return of Francisco Chaves, sheriff of the county of Santa Fé, to said writ of *habeas corpus;* which said return is in the words and figures following, to wit:

I, Francisco Chaves, sheriff of Santa Fé county, Territory of — Mexico, to whom was directed the annexed writ of *habeas corpus*, for a return to said writ do hereby state that as such sheriff I now have in my custody and confined as a prisoner in the jail of said county the said Pedro Delgado named in said writ, and that I have and hold said Delgado as such prisoner by virtue of a writ of commitment issued by the clerk of the district court of the first judicial district of said Territory under and by the direction of the judge of said court, bearing date the 20th day of January, A. D. 1891, a copy of which said writ of commitment is hereto attached and hereof made a part of this return as showing the reason, cause, and authority why I have held and restrained the said Pedro Delgado of his liberty and have confined him in said jail.

Witness my hand this 23rd day of January, A. D. 1891.

FRANCISCO CHAVEZ, *Sheriff,*
By PERFECTO J. GONZALES, *Deputy.*

26 THE TERRITORY OF NEW MEXICO:

To Francisco Chavez, sheriff of Santa Fé county, Greeting:

You are hereby commanded to have the body of Pedro Delgado, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said Pedro Delgado shall be called or charged, before the supreme court of the Territory of New Mexico, at the hour of two o'clock p. m. of Friday, January 23rd, 1891, at the capitol building, in the city of Santa Fé, N. M., to do and receive what shall then and there be considered concerning the said Pedro Delgado; and have you then and there this writ.

Witness the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court this 23rd day of January, 1891.

[SEAL.] SUMMERS BURKHART,
Clerk of said Supreme Court.

27 THE TERRITORY OF NEW MEXICO:

To Francisco Chavez, sheriff of Santa Fé county, Greeting:

Whereas, on the 15th day of January, 1891, a peremptory writ of mandamus was issued by the district court of Santa Fé county, requiring that Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, should immediately after the receipt of said writ produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fé county and record therein the records of the meeting of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in said records of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so he act as the *ex officio* clerk of the board of county commissioners, of which said board Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that he act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that he make regular entries of all the resolutions and decisions in all questions concerning the raising of money, and that he record the vote of each commissioner on any question submitted to the board if required by any member; that he sign all orders issued by the said board for the payment of money and record in a book provided for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that he do and perform all acts required of him by law as *ex officio* clerk of the board of county commissioners of Santa Fé county in connection with said Abraham Stabb, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that he recognize the said Abraham Staab, Juan Garcia,

and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that he furnish to said board all the books, records, files, and papers of his said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that he do not furnish them to any other person or persons except as the law may require him to do for the inspection and information of private individuals, which said writ was returnable before the said district court on Saturday, January 17th, 1891, by 2 o'clock p. m. of said day;

And whereas there was filed in the office of the clerk of said district court on the 19th day of January, 1891, the affidavit and petition of the said William H. Nesbitt, setting forth that the said Pedro Delgado refused to obey the said writ of mandamus heretofore issued as aforesaid, and praying that an attachment issue out of this court for the arrest of said Pedro Delgado for contempt;

28 Whereupon such proceedings were had by the said court that on January 20th, 1891, after a warrant had been issued by said court against the said Pedro Delgado and after the body of the said Pedro Delgado had been presented before the said court by you, the said sheriff, he being accompanied by counsel, and after hearing what the said Pedro Delgado had to offer in excuse for not having obeyed the said peremptory writ of mandamus, and after his further refusal to obey the said peremptory writ of mandamus, that the said Pedro Delgado was adjudged guilty of contempt and ordered to be confined in close custody in the county jail of said county of Santa Fé until such time as he shall purge himself of the said contempt:

Now, therefore, you, the said sheriff of Santa Fé county, are hereby commanded that you immediately take the said Pedro Delgado into your custody, and that you safely and securely confine the said Pedro Delgado in said common jail of Santa Fé county until the further order of the court in the premises, and this writ shall be your sufficient warrant for so doing.

Hereof fail not under the penalty of the law.

Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof, and the seal of said district court, this 20th day of January, A. D. 1891.

A. E. WALKER,
[SEAL.] *Clerk of said District Court.*

And afterwards, to wit, on the 26th day of January, 1891, there was filed in the office of the clerk of said supreme court a motion to quash said writ of *habeas corpus;* which said motion is in the words and figures following, to wit:

In the Supreme Court, Territory of New Mexico.

In the Matter of the Petition for Writ of *Habeas Corpus* of PEDRO DELGADO.

Now come the attorneys opposing the granting of the writ in the above-entitled matter, and move the court here to quash the writ heretofore issued, for the reason that the petition for the same does not show any grounds for granting such writ and is insufficient for that purpose.

J. H. KNAEBEL &
EDWARD L. BARTLETT,
Opposing the Writ.

And afterwards, at the regular term of said supreme court last aforesaid, on the nineteenth day of said term, the same being Monday, January 26, 1891, the following, among other, proceedings were had, to wit:

In the Matter of the Application of PEDRO DELGADO — *Habeas Corpus.* 462.

Now comes the sheriff of Santa Fé county, Francisco Chaves, and presents to the court here the said Pedro Delgado, who is attended by counsel, Messrs. Laughlin, Downs and Burns, and also makes return to said writ by showing the time and cause of the detention and imprisonmen; and thereupon this proceeding coming on to be heard upon the said petition, the return of said sheriff thereto, and the motion of the attorneys opposing said petition, Messrs. Knaebel & Bartlett, to quash said writ of *habeas corpus*, is argued by counsel and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement, and, on motion of said petitioner's attorneys, it is ordered that said petitioner be released from the custody of said sheriff until the decision of this court *in* had in the premises, upon his filing a bond in the sum of five hundred dollars for his appearance, to be approved by the clerk

29 And afterwards, to wit, on the 23rd day of January, 1891, there was filed in the office of the clerk of said supreme court an appearance bond; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Pedro Delgado, as principal, and John H. Schuman, Gerard D. Koch, and John P. Victory, as sureties, are held and firmly bound unto the Territory of New Mexico in the penal sum of five hundred dollars; for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed and sealed by us this 23rd day (twenty-third day) of January, eighteen hundred and ninety-one.

The condition of the above obligation is such that whereas the

above-bounden principal stands committed for contempt of the district court of the county of Santa Fé, N. M., and whereas he has this day sued out from the supreme court of the Territory of New Mexico a writ of *habeas corpus*, which said writ is now pending in said court, having been taken under advisement thereby:

Now, if the said Pedro Delgado shall well and truly appear before said supreme court, now being held at the capitol building, in Santa Fé, N. M., on Saturday, January 24th, 1891, at ten o'clock a. m. of said day, and shall remain in attendance on said court from day to day until the final decision by said court of said proceeding and until discharged by authority of law, then this obligation to be void; otherwise to remain in full force and effect.

PEDRO DELGADO.
J. G. SCHUMANN.
GERARD D. KOCH.
JNO. P. VICTORY.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

On this 23rd day of January, 1891, before me personally appeared Pedro Delgado, John G. Schuman, John P. Victory, and Gerard D. Koch, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed, and the said John G. Schuman, John P. Victory, and Gerard D. Koch, being duly sworn, each for himself says that he is worth the sum of five hundred dollars over and above his just debts and liabilities and the amount by law exempt from execution.

Witness my hand and the seal of the supreme court of New Mexico this 23rd day of January, 1891.

S. BURKHART,
Clerk Supreme Court of New Mexico.

The foregoing bond is approved by me this Jan'y 23, 1891.
S. BURKHART,
Clerk Supreme Court of N. M.

30 And afterwards, at the regular term of said supreme court last aforesaid, on the twenty-fourth day of said term, the same being Saturday, January 31st, 1891, the following, among other, proceedings were had, to wit:

In the Matter of the Application of PEDRO DELGADO — *Habeas Corpus.* 462.

This proceeding having been heard upon the writ of *habeas corpus* heretofore issued herein and the return of Francisco Chaves, sheriff of Santa Fé county, to said writ, and the motion of the parties opposing the granting of said petition to quash said writ, and having been taken under advisement by the court, the court, being now sufficiently advised in the premises, said petitioner being pres-

ent in his own proper person, attended by counsel, announces its decision by Associate Justice Freeman, denying said petition and remanding said petitioner to the custody of the sheriff until he purge himself of contempt of the district court for reasons stated in the opinion on file, Associate Justices Lee and McFie concurring and Chief Justice O'Brien dissenting. It is therefore considered and adjudged by the court that said petition be, and the same hereby is, denied and said petitioner, Pedro Delgado, be, and he hereby is, remanded to the custody of the sheriff of Santa Fé county until he purge himself of the contempt mentioned in the commitment under which he is held; and, further, that said petitioner pay the costs of this proceeding, to be taxed, and that execution issue therefor.

And afterwards, to wit, on the 31st day of January, A. D. 1891, there was filed in the office of the clerk of said supreme court a motion for an appeal to the Supreme Court of the United States; which said motion is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court of the Territory of New Mexico. January Term, A. D. 1891.

PEDRO DELGADO *vs.* FRANCISCO CHAVES, Sheriff, etc. } No. 461. Application for Writ of *Habeas Corpus*.

Comes now Pedro Delgado, petitioner in the above-named cause, by his counsel, Francis Downs and N. B. Laughlin, Esqrs., and prays the court to grant him an appeal from the decision and judgment of the court given and rendered in said cause to the Supreme Court of the United States.

And said petitioner also prays the court that during the pendency of said appeal and until said cause may be finally determined by the Supreme Court of the United States that he may be admitted to bail, and he prays that this court may, by an order, so direct and fix the amount of such bail and the terms and conditions of the bail bond.

Said petitioner further prays the court that by an order to be made and entered of record it shall be ordered and directed that on such appeal the following papers, matters, and records shall be certified to the Supreme Court of the United States by the clerk of this court as the record in this cause, viz:

1. The petition filed by the petitioner in this cause praying for the issuing of a writ of *habeas corpus*.

2. The order of this court directing that a writ of *habeas corpus* be issued.

3. The return of the sheriff, Francisco Chaves, made to said writ.

4. The motion made on behalf of the respondent to dismiss said petition and quash said writ.

5. The record entry showing a submission of this on the argument of counsel.

6. The entry of record showing the decision and judgment of the court refusing to discharge and liberate the *the* petitioner.

7. This petition and the order of the court upon the same.

8. The opinions and decisions of the respective judges of this court filed herein.

And this petitioner, as in duty bound, will ever pray, etc.

FRANCIS DOWNS AND
N. B. LAUGHLIN,
Attorneys for Petitioner.

THOMAS SMITH &
W. B. CHILDERS.

31 And afterwards, to wit, at the regular term of said supreme court last aforesaid, on the twenty-fourth day of said term, the same being Saturday, January 31st, 1891, the following, among other, proceedings were had, to wit:

In the Matter of the Application of PEDRO DELGADO — *Habeas Corpus.* 462.

Now comes said petitioner in his own proper person, attended by counsel, and moves the court to grant him an appeal from the judgment in this proceeding to the Supreme Court of the United States, and to admit said petitioner to bail during the pendency of this proceeding therein, and to direct what the record on such appeal shall contain, and the court, after argument of counsel, being sufficiently advised in the premises, grants said appeal, but denies the application to be admitted to bail. It is therefore ordered by the court that said petitioner, Pedro Delgado, be, and hereby is, granted an appeal from the judgment of this court in this proceeding to the Supreme Court of the United States upon his filing an appeal bond in the usual form in the sum of five hundred dollars, to be approved by the chief justice as to form and sufficiency; and it is further ordered by the court that the record on appeal to said Supreme Court shall contain all record entries of proceedings and papers filed herein.

And afterwards, to wit, on the 2nd day of February, 1891, there was filed in the office of the clerk of said Supreme Court an appeal bond; which said bond is in the words and figures following, to wit:

Know all men by these presents that I, Pedro Delgado, as principal, and Solomon Spiegelberg and Florence Donoghue, as securities, are held and firmly bound unto the clerk of the Supreme Court of the United States of America in the penal sum of five hundred dollars, lawful money of the United States of America; to the payment of which, well and truly to be made, we bind ourselves and our joint heirs and administrators firmly by these presents.

Sealed with our seals and dated this 31st day of January, A. D. 1891.

The condition of the above obligation is such that whereas the said Pedro Delgado has prayed an appeal from the decision and judgment of the supreme court of the Territory of New Mexico to the Supreme Court of the United States in the case of his petition for a writ of *habeas corpus*, and said appeal having been granted this 31st day of January, A. D. 1891, by said supreme court of the Territory of New Mexico:

Now, if the above-bounden Pedro Delgado shall prosecute without delay and with effect his said appeal and shall well and truly pay or cause to be paid all costs that may accrue in said cause and obey any order that said Supreme Court of the United States may make therein if said appeal be withdrawn or dismissed, then this obligation to be null and void; otherwise to remain in full force and effect.

PEDRO DELGADO. [SEAL.]
SOLOMON SPIEGELBERG. [SEAL.]
FLORENCE DONOGHUE. [SEAL.]

Approved by me this 31st day of January, A. D. 1891.

JAMES O'BRIEN,
Chief Justice of the Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Solomon Spiegelberg and Florence Donoghue, sureties on the above and foregoing bond, having been severally sworn according to law, each upon his oath says that he is worth the sum set opposite to his name below in property situate in said Territory over and above his just debts and property exempt by law from execution and forced sale.

SOL. SPIEGELBERG. Five hundred.
FLORENCE DONOGHUE. Five hundred.

Subscribed and sworn to before me this 31st day of January, A. D. 1891.

JAMES O'BRIEN,
Chief Justice Sup. Court, Terr. New Mexico.

32 And afterwards, to wit, on the 31st day of January, 1891, there was filed in the office of the clerk of said supreme court an opinion of the court; which said opinion is in the words and figures following, to wit:

In the Supreme Court, Territory of New Mexico. January Term, 1891.

PEDRO DELGADO }
vs. } *Habeas Corpus.*
FRANCISCO CHAVEZ, Sheriff. }

This is an application for a writ of *habeas corpus* to be discharged from the custody of the sheriff of Santa Fé county, New Mexico.

The petition is very voluminous and sets out in full a certain proceeding in mandamus instituted against the relator by Abraham Staab, Juan Garcia, and William H. Nesbitt on the 13th of January, 1891, seeking to compel the relator, as probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners, to perform certain official duties. This is one of the unfortunate proceedings that grew out of the closely contested election held in the county of Santa Fé on the 4th day of November, 1890. Rival sets of county commissioners claim to have been elected. Candidates of both parties held what they claim to be valid and proper certificates of election. An alternat-e writ of mandamus was issued against the relator, commanding him to recognize the petitioners to that writ as the legal elected board. In his answer to the writ the relator admitted that he had declined to recognize the petitioners, and sets out at length his views as to who were entitled to exercise the functions of county commissioners. The cause having been heard by the district judge, a peremptory writ was issued. The relator refusing to obey the writ, an attachment was issued, and on the hearing he was committed to jail until he should purge himself of the contempt.

In the case of John H. Sloan and Teodoro Martinez, heard and determined at the present term of this court, we have dis-
33 cussed at some length the power of the district judge to issue the writs of mandamus and injunction and to punish for contempt. Much of what was said in that case finds appropriate application to this. The case at bar, however, differs from the case of Sloan and Martinez, in this: that the latter case involved the right of the district judge to direct the canvassers to canvass the votes cast at the election, while in the present case the question involved is as to the jurisdiction of the court to issue the writ to the probate clerk, directing him which of the two rival boards he should recognize as the lawful body.

We have no doubt but that the judge has jurisdiction of the subject-matter and of the parties, and this conclusion settles, as we think, the whole question raised by this proceeding.

The writ of mandamus long since ceased to be a prerogative writ. It is no longer extraordinary proceeding, except in the sense that an injunction, attachment, or other like process is extraordinary.

"It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties and is not now regarded as a prerogative writ."

Commonwealth of Ky. *v.* Dennison, Gov., &c., 24 How., 97.

It would be a vain and needless exhibition of research to undertake to point out the almost innumerable instances in which this writ has been successively invoked. The following cases will serve to illustrate the general purposes for which the writ will lie:

To compel the allowance of appeal, 4 Otto, 14; to allow a pension, 14 Peters, 497; to compel district judge to issue execution, 11 Pet., 173; to compel railroad company to deliver rolling stock, 5th Wallace, 825; to compel counties to pay judgments, 4 Wallace, 435;

to enforce mandates, 21 How., 445; to reinstate cause, 6 Peters, 774; to compel levy of tax to pay judgment, 6 Wallace, 514; to compel court to enter judgment, 9 Peters, 573; to compel court to sign bill of exceptions, 5 Peters, 190; to compel Postmaster General to perform ministerial duty, 12th Peters, 524; to compel register of land office to enter application for land, 2 Wheaton, 369; to compel Court of Claims to entertain motion for new trial, 13 Wallace, 664; to restore an attorney disbarred by court having no jurisdiction, 7 Wallace, 364; to compel town officers to audit charges against the town, 1st Otto, 536.

34

In Ohio, Alabama, California, Maryland, North Carolina, Indiana, and Montana the writ will lie to compel the Governor of the State to perform a merely ministerial duty. (High's Extraordinary Legal Remedies, 119.)

It has also been successfully invoked to compel an old officer to deliver records which concern justice to the new one; to compel the clerk of a company to deliver up books, &c., or the steward of a borough to attend with the books at the next corporate assemble, &c. Comyn's Digest, vol. 5th, 34. In the case of the American Railway-Frog Company *vs.* Haven *et al.*, in 101 Mass., 403, it was said:

"It is well settled that it can be granted, for instance, to compel a town clerk or clerk of the public corporation whose office has expired to deliver over to his successor his common seal, books, &c."

In the case of John A. Conlin *vs.* Samuel N. Aldrich *et al.* the following facts appear: The town meeting had been held, at which Conlin was chosen as a member of the school committee for the term of three years, but the polls were open and the election was made after sunset. This election was treated as invalid and another meeting called, at which Burditt was elected to the same office. The town clerk gave to Conlin a certificate of his election, but Aldrich and Start, who were the two other members of the committee, refused to recognize him as their associate or to permit him to act as such, they recognizing Burditt as properly elected. The application of Conlin for a writ of mandamus was allowed, Hoar, J., declaring: "It is not very strongly contested by the respondents that the appropriate remedy for the petitioner, if he is entitled to any relief, is the writ of mandamus. That point is substantially settled by the case of Strong, petitioner, 20 Pick., 484."

This case, like the one at bar, presents the condition of rival claimants for the same position; so, also, of the case just cited from 101 Massachusetts, where it was said:

"The respondents insist, however, that inasmuch as they are actually in possession of the office in question under a claim of right and exercising the functions annexed to them the only mode of controverting their title is writ of *quo warranto*. The fact that the offices are *de facto* filled and occupied by rival claimants, is by no means decisive and not very material upon this point. It has been so decided in the case of conflicting claims to the office of county commissioner. Strong, petitioner, 20th Pick., 484. Also in the case of school committee. Coulin *vs.* Aldrich, 98 Mass., 557."

35

In the case of Jennings *vs.* Fisher and another, 61st Mass., 239, it was said:

"This writ, no doubt, is more freely and frequently granted *granted* at the present time than it was formerly. It lies to a former *twon* clerk or clerk of a company to deliver to his successor the common seal, books, papers, and records of the corporation which belong to his custody. Indeed, it lies to any person who happens to have the books of a corporation in his possession and refuses to deliver them up."

In the case of Kimball *vs.* Lamprey, 19 N. H., 220, Gilchrist, U. J., said:

"There are numerous authorities tending to show in what case a writ of mandamus is the appropriate remedy. In the case of Commonwealth *vs.* Athearn, 3rd Mass., 285, it is intimated by Parsons, C. J., that the proper mode is for the successor of the town clerk to take the oath of office and to demand of the former clerk the records, and if they are refused, then to move for a mandamus to command him to deliver over the records. It was alleged in that case that the defendant was in possession of the office, but was not so legally. In The First Parish in Sudbury *vs.* Stearns, 24 Pick., 148, trover was brought against the defendant for the boo- of record of the parish. His defence was that he was the clerk, and as such had the right to the possession of the records. Morton, J., says 'a mandamus would doubtless be a more appropriate and effectual remedy to compel the delivery of the records to the legal officer,' and he cites the case of Commonwealth *vs.* Athearn. The rights of persons acting *colore officii* can be tried only in an information in the nature of a *quo warranto* or on a writ of mandamus."

To the same effect is the doctrine laid down by the supreme court of Vermont in the case of Allen Stone *et al. vs.* Joseph B. Small *et al.*, the syllabus of which is as follows:

"1. Mandamus is the proper remedy to compel the old trustees of an incorporated village, attempting to hold over, to deliver the new board books, papers, and articles of personal property in their possession belonging to the village and to prevent their interfering with the new trustees in the exercise of their office.

"2. When an act incorporating a village imperatively declares that its trustees shall be annually elected on a certain day the majority of a meeting called for the purpose of electing such officers has no power to adjourn the meeting without day in fraud of the law and the minority, and if a legal minority immediately following such adjournment reorganizes the meeting and elects
36 trustees they are entitled to hold their office."

These authorities, we think, demonstrate the fact that although the proceeding by mandamus against the relator involved incidentally, if not directly, the title set up by the rival set of commissioners, the mandamus was not, for that reason, void. It was resisted, however, by the relator on the ground that it could not be used as a means of contesting the right of the rival claimants to the office. There might be much force in the reasons assigned in support of this doctrine if alleged against the propriety of the proceed-

ings by mandamus; but the mistake of the relator lay in supposing that this objection could be successfully interposed as a justification for a refusal to obey the mandate of the court.

There is a marked difference between the utter want of jurisdiction and an erroneous exercise thereof. The former may be plead as a justification for a refusal to obey the order of the court, but the latter cannot.

Cohen *vs.* Jones, 5th Cal., 495.
Church on *Habeas Corpus*, 317.

In the case of Peo. *ex rel.* Garbutt *vs.* R. & S. L. R. R. Co., 76 N. Y., 298, it was said:

"The question of the propriety of that order is not now before us, the present appeal being only from the order adjudging the appellants guilty of contempt in not having obeyed the writ."

It is insisted, however, that the mandamus was void for the reason that it was vague and uncertain in its command; that it required the relator not only to recognize certain parties as entitled to exercise the functions of the office, but that he was also commanded, among other impracticable things, to enter all the past as well as the future orders of said court; that the writ, in effect, commanded him to do what was not then and might never become his duty. This writ did not, as we understand it, seek to impose on the relator any impracticable or difficult duty. It simple required him to perform his usual and ordinary duties as *ex officio* clerk
37 to the board. Whatever this board had already done that had not been recorded was to be recorded, and he was to attend from time to time in the future to perform his usual functions in the usual was.

It is not pretended that it was not in his power to obey the leading and all-important command laid upon him. It is not possible that he could have misapprehended the principal purpose of the writ, which was to direct him to recognize in his official capacity one of the rival sets of claimants and to refuse to recognize the other. He seems to have misapprehended entirely the functions of his office. He was not authorized by law to determine who were and who were not the legal-elected commissioners. The question had already been determined so far, at least, as to bring his ministerial duties within the jurisdiction of the court.

It does not follow that because the court ordered him to do that which in part he could not do that therefore the writ was void. In the case of the United States *ex rel. v.* Labette County, 2nd McCrary Reports, 27, a writ of mandamus was issued to compel the supervisors to levy, collect, and pay over certain taxes. The respondents levied the tax, but returned that they had not power, process, or authority by which they could collect it. A writ of attachment having been issued, they were discharged, for the reason that having done all in their power to obey the writ they were not guilty of contempt.

This question was discussed at some length in The People *ex rel. v.* Nostrand, 46 N. Y., 378. In that case it was said:

"It was also urged upon the argument that the order should be reversed because the precise amount is not specified in the peremptory writ. This position is not tenable. All that is necessary is that the thing to be done should be described with reasonable certainty—with such certainty that the defendant will know what is required of him. This rule is peculiarly applicable to public officers who are commanded to perform a public duty, and especially where the facts constituting the act are within their personal knowledge."

After citing many authorities in support of this view the court proceeds to say:

38 "This and other authorities -stablish that it is sufficient to inform public officers in a general way what their duty is and to command its performance unless they can justify or excuse the neglect. They cannot shield themselves behind the technical objection to the descriptive part of the act to be done."

Numerous other authorities might be cited in support of the general proposition that — an application for *habeas corpus* to be discharged from commitment for contempt it cannot be shown that the proceedings out of which the action for contempt proce-ded were irregular.

Cooley on Constitutional Limitation, 348, and cases cited in support of the proposition that a proceeding by mandamus is not void by reason of mere irregularity, but that it may — good as to part and bad as to part. We cite:

Ex parte Parks, 93 U. S., 18;
Ex parte Rowland, 104 U. S., 604;
Ex parte Clarke, 100 U. S., 399, and
Ex parte Diebold, 100 U. S., 37.

Assuming, however, for the purpose of the argument that the relator did not properly comprehend the terms of the mandate addressed to him; assuming that in the presence of rival claimant- for the office he was at a loss to know how he should proceed; assuming he honestly believed that the petitioners in the mandamus proceeding had not been elected and were not, therefore, entitled to exercise the functions of the office, what, then, was his plain and unmistakable duty? Was it his province to make an issue with a court of competent jurisdiction and, after having the questions thus presented decided against him, to defy the power of the court? Can he escape now the rightful consequences of his contumacy by pretending that he did not understand what was required of him? On this point the case already referred to in 46th New York is instructive. It was there said, page 378:

39 "If he desired in good faith to comply with the writ, but was unable to do so from the uncertainty of the mandate, the court would doubtless relieve him; but in this case there was no room for doubt. The act to be performed was specifically described, and there is no pretence that the appellant did not know what was required or that he was unable to perform it."

In view of these considerations and in view of the opinion already expressed in the case referred to of Sloan and Martinez, we are of

the opinion that the writ must be dismissed and the relator remanded to the custody of the sheriff, to be confined in the county jail until he purges himself of the contempt for which he was committed; and it is so ordered.

A. A. FREEMAN,
Associate Justice.
W. D. LEE,
Ass't Justice.
JOHN R. McFIE,
Associate Justice.

40 And afterwards, to wit, on the 31st day of January, 1891, there was filed in the office of the clerk of said supreme court a dissenting opinion of the court; which said opinion is in the words and figures following, to wit:

O'BRIEN, *C. J.*, dissents:

I regret my inability to agree with the disposition made of this case as announced in the foregoing opinion. It would serve no useful purpose to repeat the facts in the brief statement of the reasons that compel me to dissent.

In the alternative writ the relator is required to act as follows: "Now, therefore, you, the said Pedro Delgado, probate clerk of the county of Santa Fé and *ex officio* clerk of the board of county commissioners of said county, are hereby commanded that, immediately after the receipt of this writ, you produce the books in which are kept records of meetings and proceedings of the board of county commissioners of Santa Fé county and to record therein the records of the meetings of said board and the proceedings thereof held on the 2nd day of January, 1891, and record in the said record of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fé, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board, if required by any memeber; that you sign all orders issued by the said board for the payment of money and record in a book printed for that purpose
41 the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as *ex officio* clerk of the board of county commissioners of Santa Fé county, in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt as the proper and only persons composing the board of county commissioners of Santa Fé county, and that you recognize the said Abraham Staab, Juan

Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fé county and as composing the only lawful board of county commissioners of said county, and that you furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them to any person or persons except as the law may require you to do for the inspection and information of private individuals, or that you show cause before the first judicial district court of the Territory of New Mexico in and for the county of Santa Fé, at chambers, in the Federal building, in the city of Santa Fé, New Mexico, on Wednesday, January 14th, 1891, at 9 o'clock a. m., why you have not done so," &c.

On the return day of the writ the relator, Delgado, appeared and filed his answer thereto as follows:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of Santa Fé County.

THE TERRITORY OF NEW MEXICO on the Relation of ABRAHAM STAAB and Others
vs.
PEDRO DELGADO.
} Mandamus. No. 2838.

The above-named defendant, Pedro Delgado, now and at all times hereafter reserving unto himself all manner of objections and exceptions to the many uncertainties, imperfections, and insufficiencies in the alternative writ of mandamus issued in the above-named cause, for answer thereto or so much thereof as he is in-
42 formed and advised that — is necessary for him to make answer unto, answers and says that he admits that at the general election held in the said county of Santa Fé on the 4th day of November, 1890, he, the said defendant, was duly elected clerk of the probate court of the said county, and that on the 1st day of January, 1891, he, having duly qualified as such clerk, *and* entered upon the discharge of the duties of such office, and that he has continuously since said last-mentioned date been in the possession of such office and has been *ex officio* clerk of the board of county commissioners of the said county, and has had and held possession of the records and books which by law he is made the custodian of. Said defendant admits that in the month of November, 1890, and for a long time previous thereto and until the first day of January, 1891, George L. Wyllys, Teodoro Martinez, and John H. Sloan were the legally elected and lawfully acting members of the board of county commissioners of Santa Fé county, in said Territory, but he denies that the said Wyllys and Martinez or either of them were ever removed from their said office, or that the office held by either of said persons became vacant prior to the expiration of their term, to wit, on the first day of January, 1891; and he denies that either of the said persons abandoned their said offices or that they

or either of them refused to perform the duties and functions thereof; and he denies that George W. North and Frederick Grace or any other persons were ever legally appointed by the acting Governor of the Territory of New Mexico or any other person as member- of the board of county commissioners of said county; he denies that the said George W. North and Frederick Grace or either of them were ever members of the board of county commissioners of said county or that they or either of them ever had any power or authority to perform the duties or exercise the functions of said offices; and this defendant avers the fact to be that on the 4th day of November, 1890, and for many months prior thereto and continuously
43 until the first day of January, 1891, John H. Sloan, George L. Wyllys, and Teodoro Martinez were the duly elected and qualified members of the board of county commissioners in and for the county of Santa Fé, in said Territory, and that they each and all of them continued to hold such office and were in the actual possession thereof and performing all the duties and functions of such offices during all the year 1890 and up until the first day of January, 1891.

This defendant denies that at the election held in the county of Santa Fé on the 4th day of November, 1890, Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, were elected as members of the board of county commissioners of said Santa Fé county; and he denies that the said Staab, Garcia, and Nesbitt ever obtained or that they now have or hold any certificate showing that they or either of them was at said election elected as members of the board of commissioners of said county; and said defendant also denies that the said Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, have ever qualified as members of said board of commissioners, and he denies that the said Staab, Garcia, and Nesbitt, or either of them, have by virtue of any such election had or held possession of the office of a member of the board of county commissioners of said county, or that they or either of them have held any session as members of said board of county commissioners by virtue of such election, nor have they or either of them, by virtue of such election, performed any of the duties pertaining to such office; but he alleges the fact to be that at the general election held in and for said county of Santa Fé, in said Territory, on the 4th day of November, 1890, George L. Wyllys, Charles M. Creamer, and Higinio Martinez were each duly elected as member of the board — commissioners in and for the county of Santa Fé and Territory of New Mexico, the said Wyllys, Creamer, and Martinez receiving at said election the greatest number of legal votes cast at said election, said county, for said offices of county commissioners for said county,
44 and after said election returns thereof were made as required by law, and the board of county commissioners then in office for said county met as a canvassing board of election for said county and duly counted and canvassed all the votes cast in the several precincts in said county at said election, returns of which were before said board, and after counting and canvassing said votes and returns the said board of commissioners, as such canvassing board,

ascertained that the said George L. Wyllys, Charles M. Creamer, and Higinio Martinez had been and were duly elected as members of the board of county commissioners for said county of Santa Fé at said election, all of which was duly entered of record, and thereupon said board of commissioners, as such canvassing board, issued, under their hands and the seal of said court, certificates to said Wyllys, Creamer, and Martinez, setting forth that they had been duly elected at said election as members of the board of county commissioners of said county of Santa Fé, which said certificates were duly attested by the probate clerk of said county; and afterwards, to wit, on the first day of January, 1891, the said Charles M. Creamer and Higinio Martinez each having duly qualified as members of the board of county commissioners of said county of Santa Fé, they entered into possession of and assumed the duties of their said offices, and met together in the court-house of said county, in the city of Santa Fé, as the board of county commissioners of said county, and proceeded to transact business as such. The said Creamer and Martinez have continuously from the first day of January, 1891, had and held possession of said offices, and at the present time and at the date of the issuing of the alternative writ of mandamus in this action the said Creamer and Martinez were and are holding and are in the possession of said offices, and are now and have at all times since the first day of January, 1891, been the legal, acting members of the board for the said county of Santa Fé, and have during all of said
45 time been transacting the public business of said county as such commissioners.

Said defendant states that he is not informed as to what acts or proceedings were done or had by one Frederick Grace and one George W. North, pretending to act as members of the board of county commissioners, in reference to the counting and canvassing the returns of election of the general election held in said county on the 4th day of November, 1890; but he states whatever they may have done in that respect was wholly illegal and of no effect, for said Grace and North were not at the time of their said pretended action and the counting and canvassing of said votes members of the board of commissioners of said county of Santa Fé.

Said defendant admits that he has refused to recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as members of the board of commissioners of said Santa Fé county, for the reason that they have never been elected and qualified as such officers and because they have not been in the possession of said offices and have never acted as members of such board, and denies that the said Staab, Garcia, and Nesbitt have ever met as such board or held any session as such, as set forth in the alternative writ of mandamus herein, but he says that since the first day of January, 1891, Charles M. Creamer — Higinio Martinez have been the legal and acting board of commissioners of said county.

As to all the allegations and statements set forth in said alternative writ not herein expressly admitted or denied the said defendant states that he has no sufficient information upon which to form a belief, and therefore denies all of said allegations.

PEDRO DELGADO.

Pedro Delgado, being duly sworn, on his oath states that the facts set forth in the foregoing answer are true, to his best knowledge, information, and belief.

PEDRO DELGADO.

46 Subscribed and sworn to before me this 5th day of January, 1891.

N. B. LAUGHLIN,
Notary Public.

Thereupon, on the motion of Staab, Garcia, and Nesbitt, the three alleged county commissioners before mentioned, without further hearing or proceedings the alternative writ was made peremptory; and thereafter, on the affidavit of said William H. Nesbit, filed January 19th, 1891, the following order was entered:

"It being shown to the court by the petition and affidavit of William H. Nesbitt, filed this 19th day of January, 1891, in the cause lately pending in said district court in which Abraham Staab, Juan Garcia, and William H. Nesbitt were relators and Pedro Delgado was respondent, that the said defendant, Pedro Delgado, has refused and still does refuse to obey the peremptory writ of mandamus issued out of this court in said mandamus proceeding on the 15th day of January, 1891, it is ordered by the court that an attachment for contempt, returnable at five o'clock this afternoon, issue for the arrest of said defendant, Pedro Delgado.

Santa Fé, New Mexico, January 19, 1891.

EDWARD P. SEEDS,
Associate Justice, &c."

Thereafter, on January 20, 1891, the following final judgment was entered:

"It is considered and adjudged by the court that said defendant, Pedro Delgado, is guilty of contempt of this court in refusing to obey and in disobeying the command of said writ of mandamus, and it is further adjudged by the court that said Pedro Delgado stand committed to the common jail of Santa Fé county until he purges himself of such contempt, and that a warrant of commitment issue against him.

Santa Fé, New Mexico, January 20th, 1891.

EDWARD P. SEEDS,
Associate Justice, &c."

In pursuance of this judgment a commitment issued, and Delgado was imprisoned in the county jail.

47 To be relieved of such imprisonment he instituted his present *habeas corpus* proceeding before this court.

In this connection I cite chapter 60, Laws of 1887, sec. 1: "That in all cases of proceeding by mandamus in any district court of this Territory the final judgment of the court thereon shall be reviewable by appeal of writ of error in the same manner as now provided

by law in other civil cases, except that such appeal or writ of error shall not operate as a supersedeas of any judgment of the district court."

The judgment of the district court was the imprisonment of Delgado until he obeyed the command of the peremptory writ, and, according to the provisions of the statute above cited, no appeal or writ of error could release him from such imprisonment, no matter how erroneous or illegal the judgment authorizing it might be, until the final determination of the appeal or writ of error in this court.

The gist of all the orders contained in the alternative and peremptory writ of mandamus is that Delgado recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as the only persons composing the lawful board of county commissioners of Santa Fé county; all other acts commanded are the mere incidents of this recognition. The answer of Delgado to the alternative writ showed in apt terms why he did not so recignize them.

Without admitting or denying the validity of this writ, I am clearly of the opinion that Delgado's answer thereto raised a material issue of fact. The motion of the county commissioners to make the writ peremptory, notwithstanding the answer, was in the nature of a demurrer to its sufficiency, and the judgment of the court in granting that motion was, in effect, and order sustaining such demurrer. This, in my judgment, was substantially error, from the consequences of which Delgado cannot be relieved
48 by appeal or writ of error. He is in jail and has no ad-quated remedy against such illegal imprisonment, unless it may be afforded him in this proceeding. I do not overlook the provision of sec. 2013, Compiled Laws, 1884; it must not be forgotten, however, that that section contains the following qualification:

"But no order of commitment for any alleged contempt or upon proceedings as for contempt to enforce the rights or remedies of any party shall be deemed a judgment, conviction, or decree within the meaning of this section, nor shall any attachment or other process issued upon any such order be deemed an execution within the meaning of this section."

I hold, then, if substantial error, prejudicial to the rights and liberty of the petitioner herein, appears upon the record of this proceedings that the same are reviewable and, although contained in the final judgment, declaring him in contempt.

Believing, then, that such judgment was entered in violation of law and that the relator is deprived of his liberty in consequence thereof, I hold that he is entitle- to his discharged from this illegal imprisonment.

The record in this case contains, in my opinion, other errors especially fatal to the petitioner's confinement, but it would answer no useful purpose to consider them in connection with this opinion.

A labored citations of authorities from States, each having peculiar statutes regulating the procedure of the courts and the rights of the parties seeking relief from restraints deemed illegal, might show a great deal of legal research, but would throw little or no light upon

the case under consideration. I cannot close this hastily written opinion more appropriately than by citing the language of the court of appeals in the State of New York in the historic case of the "People *vs.* Liscomb," 60 N. Y., 559.

49 "Jurisdiction of the person of the prisoner and of the subject-matter are not alone conclusive, but the jurisdiction of the court to render a particular judgment is a proper subject of inquiry; and while the court cannot upon a return of the writ go behind the judgment and inquire into alleged error and irregularities preceeding it, the question is presented and must be determined whether upon the whole record the judgment was granted by law and was within the jurisdiction of the court."

JAMES O'BRIEN,
Chief Justice.

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fé.

I, H. S. Clancy, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinions filed in the matter of the application of Pedro Delgado for a writ of *habeas corpus* as the same now appears remaining in my office.

Seal Supreme Court, Territory of New Mexico.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this 9th day of February, A. D. 1891.

H. S. CLANCY, *Clerk.*

Endorsed on cover: New Mexico Territory supreme court. No. 1648. Pedro Delgado, appellant, *vs.* Francisco Chavez, sheriff of Santa Fé county, Territory of New Mexico. Filed March 6, 1891.

No.....

SUPREME COURT

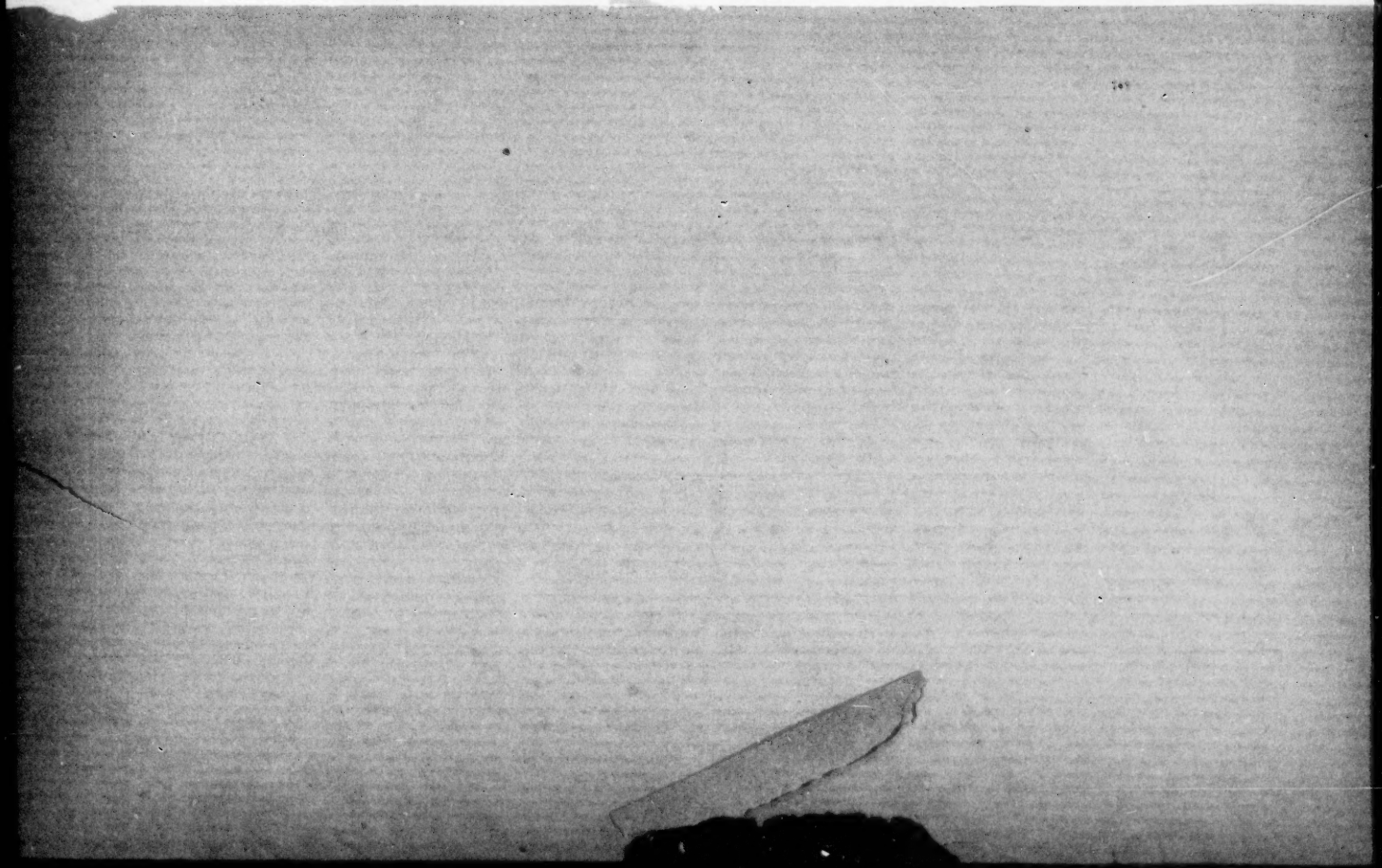
OF THE

UNITED STATES.

October Term, 1891

Ex-Parte PEDRO DELGADO.

Petition and motion to advance Cause on Docket.



The United States of America.

TO THE

Honorable SUPREME COURT of the United States.

In the matter of the application of PEDRO DELGADO, for a writ of *Habeas Corpus*, on appeal from the Supreme Court of the Territory of New Mexico.

Your petitioner, Pedro Delgado, respectfully shows unto this honorable court, that heretofore, to wit, on the 13th day of January, A. D. 1891, he was the clerk of the Probate Court of the county of Santa Fe, in the Territory of New Mexico, and as such officer he was ex officio clerk of the Board of County Commissioners in and for said county. That on said day Abraham Staab, William H. Nesbitt and Juan Garcia presented to the Judge of the District Court of said Santa Fe county their petition and application, praying that a writ of mandate might be issued directing and commanding said Delgado, as such clerk, to recognize and act with said Staab, Nesbitt and Garcia as the Board of County Commissioners of said county, and on said day, in accordance with the prayer of said petition,

an alternative writ of mandate was issued, by order of said judge, directing your petitioner, as the clerk of said Probate Court, to recognize and act with said Abraham Staab, William H. Nesbitt and Juan Garcia, as the Board of Commissioners of said Santa Fe county, or to show cause before said judge and court why he should not do so; and upon said writ being served upon your petitioner, in obedience thereto, on the 15th day of January, 1891, he appeared before said judge and filed his answer under oath, to said writ, in which he set forth and denied that the said Staab, Nesbitt and Garcia, or either of them, had ever been elected as members of the Board of County Commissioners of said county, or that either of said persons had ever quallified as members of said board, and that neither of said persons had ever been in possession of said offices and had never acted as such officers, and he set forth in such answer that at the general election held in said county and territory, on the 4th day of November, 1890, George L. Wyllis, Charles M. Creamer and Higinio Martinez were duly elected as members of the Board of County Commissioners in and for said county of Santa Fe, and on the 1st day of January, 1891, the said Creamer and Martinez, having qualified as such officers, entered into the actual possession of their said offices, and commenced to discharge the duties thereof, and so continued in such offices and to discharge the duties thereof, until the filing of such answer by your petitioner; and upon the filing of such answer your petitioner demanded that the issue formed thereby should be tried at a term of court and before a jury, as required by the laws of said territory, but said judge, disregarding such demand, in vacation, and without hearing any evidence, adjudged said answer to be insufficient, and thereupon ordered and directed that a peremptory writ of mandamus be issued, directing and commanding your petitioner to recognize and act with said Abraham Staab, William H. Nesbitt and Juan Garcia, as the Board of Commissioners of said Santa Fe county, and that he do so as to all future acts and proceedings that might be had. And the said writ having been issued by order of said judge, and the same having been served upon your petitioner, he fail-

ed and refused to comply with the terms and commands thereof for the reason that the said Charles M. Creamer and Higenio Martinez were then actually serving and acting as members of the Board of Commissioners of said county and discharging the duties of such offices; and thereupon said judge in vacation, on the 20th day of January, A. D. 1891, ordered and directed that your petitioner should be committed to and confined in the jail of Santa Fe county until he should comply with and obey the commands of said writ of mandate; and thereupon on said day a commitment was issued to the sheriff of said county, under which your petitioner was arrested and committed to the jail of said county.

And afterwards, on the 23rd day of January A. D. 1891, your petitioner presented to the supreme court of said territory his petition and application for a writ of *habeas corpus* for the purpose of having the legality of his said imprisonment inquired into, and said court on said day directed said writ to be issued for the production of the body of your petitioner before said court, and said writ having been returned, and the body of your petitioner having been produced before said court, and said court having heard and considered said application, on the 31st day of January A. D. 1891, refused to release and discharge your petitioner from said imprisonment, and ordered and directed, that your petitioner be remanded into the custody of the sheriff of said county of Santa Fe, and that such sheriff confine your petitioner in the jail of said county until he should comply with the writ of mandate issued by order of said district judge. And thereupon your petitioner prayed and appeal from the decision and judgment of said supreme court to the supreme court of the United States, and prayed that pending such appeal he might be admitted to bail; and the supreme court of said territory granted the prayer of your petitioner for an appeal but refused to admit him to bail pending such appeal; and thereupon your petitioner was remanded and committed to the jail of said Santa Fe county where has been since said date confined and detained.

Your petitioner therefore most respectfully prays that his said cause now pending in this honorable court may be

advanced upon the docket, and that the same may be set down for hearing at an early day, to the end that the legality of his said imprisonment may be inquired into and that he may be restored to his liberty, if such imprisonment shall be found to be illegal, and as in duty bound will ever pray, &c.

TERRITORY OF NEW MEXICO,)
COUNTY OF SANTA FE.)

PEDRO DELGADO, being duly sworn, upon his oath states that the facts set forth in the foregoing petition are true of his own knowledge.

Subscribed and sworn to before me this day of February, A. D. 1891.

Supreme Court of the United States

OCTOBER TERM, 1890.

No. 1456.

PEDRO DELGADO, Appellant,

v.

FRANCISCO BAEZ,

Sheriff of Santa Fe County, Territory of New Mexico.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF AND ARGUMENT OF APPELLANT.

C. H. [illegible]

Of Counsel for Appellant.

W. K. [illegible]

IN THE

Supreme Court of the United States.

October Term, A. D. 1890.

IN THE MATTER OF THE APPLICATION OF PEDRO DELGADO FOR A WRIT OF HABEAS CORPUS.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLANT.

Statement of Case.

On the 13th day of January, A. D. 1891, Abraham Staab, William H. Nesbitt, and Juan Garcia presented to the judge of the First Judicial District of the Territory of New Mexico their petition, in which they set forth certain facts by which it is contended that the said Staab, Nesbitt, and Garcia were shown to have been elected as members of the Board of County Commissioners of Santa Fe county, in said Territory. The petition is set forth on pages 1 to 6 of the record. It is also set forth in the petition that the appellant, Pedro Delgado, was the clerk of the Probate Court of said county, and, as such, he had

the possession of the books, papers, and records belonging to such board; and that appellant refused to act with and refused to recognize the said Staab, Nesbitt, and Garcia as members of said Board of Commissioners, and the petitioners prayed that a writ of mandamus might issue commanding appellant to recognize said Staab, Nesbitt, and Garcia as the only legal members of the Board of Commissioners of said county, and that he act with such persons as said board, and that he enter of record the proceeedings had by such persons as such board in the past and also to enter all proceedings that such persons as such board might direct to be entered in the future.

Upon this petition an alternative writ of mandate was issued as prayed for, directing the appellant to do the things commanded or show cause why he should not be required to do so. This writ is set forth on pages 7 to 12 of the printed record [6 to 11, MS.]. Upon the service of such writ upon the appellant, he appeared before such judge and filed his answer, in which he set up facts showing that at the general election held in said Territory on the 4th day of November, A. D. 1890, George L. Wyllis, Charles M. Creamer, and Higinio Martinez were duly elected as members of the Board of Commissioners of said Santa Fe county and received from the proper authorities certificates of their election, and that on the 1st day of January, A. D. 1891, the said Creamer and Martinez, having duly qualified as members of such board, entered upon the discharge of their duties, taking actual possession of their said offices, and were in the active and actual discharge of their official duties continuously from said 1st day of January until the filing of such answer; and appellant in such answer denied that said Staab, Nesbitt, and Garcia, or either of them, had ever been elected as members of said Board of Commissioners, or that they, or either of them, had ever qualified as members of such

board or had ever been in the possession of such offices or acted as members of such board. This answer is set forth on pages 13 to 16 of the printed record [11 to 13, MS.]. On the filing of this answer, the appellant demanded that the issues should be tried by a jury during a term of the court, but the said judge, disregarding such request, in vacation, adjudged such answer insufficient, and, without hearing any evidence, ordered that a peremptory writ of mandamus should issue in accordance with the prayer of said petition. See pages 16 and 17 of the printed record [14, MS.] for this order. And thereupon such peremptory writ was issued, containing the same commands as were contained in the alternative writ, the peremptory writ being set forth on pages 17 to 23 of the printed record [15 to 18, MS.]. Service of such peremptory writ being made upon the appellant, he refused to obey the commands thereof; and an attachment was issued against him, and he was taken before such judge, charged with a contempt of court; and, he still failing to comply with the commands of the writ, an order was made by said judge directing that the appellant be confined in the jail of said county until he should obey the commands of the writ; and that a commitment should be issued to the sheriff of said county, directing the confinement of appellant in such jail. See pages 26 to 28 of the printed record [21 and 22, MS.] for such order and pages 28 and 29 of the printed record [22 and 23, MS.] for such order of commitment.

By virtue of such commitment, the sheriff of said county confined appellant in the jail of said county, and on the 23d day of January, A. D. 1891, appellant presented his petition to the Supreme Court of the Territory of New Mexico, praying that a writ of *habeas corpus* might be issued requiring the sheriff of said county to produce the body of appellant before said court, to the end that

the legality of his imprisonment might be inquired into. This petition is set forth on pages 1 to 31 of the printed record [1 to 24, MS.], and contains a complete record of all the proceedings had before the judge of the District Court. Upon the filing of such petition, such court directed that the writ be issued as prayed for, the order directing the issuing of the writ being set forth on page 31 of the printed record [page 24, MS.] and the writ being set forth on pages 31 and 32 of the printed record [page 24, MS.]. Said writ being returned and the person of the appellant being produced before the court, the counsel opposing the discharge of appellant filed a motion to quash the writ and dismiss the petition, and this motion, and the sufficiency of the facts set forth in the petition of appellant to justify his being held and restrained of his liberty being submitted to the court, the majority of the court—the chief justice dissenting—held and decided that the confinement or restraint of the appellant was legal; and his petition was dismissed, the writ quashed, and he was remanded to the custody of the sheriff of Santa Fe county. Appellant thereupon prayed an appeal to this court, which was granted, and he also applied to the Territorial Supreme Court to be admitted to bail during the pendency of such appeal, but this request was denied, and he was recommitted to jail. See pages 37 to 49 of the record for the judgment of the court and the proceedings relating to the appeal.

Assignment of Errors.

The appellant has assigned in this court the following errors:

Now comes the appellant, Pedro Delgado, by C. H. Gildersleeve and Wm. M. Springer, his attorneys, and says that in the record, judgment, and proceedings of the Su-

preme Court of the Territory of New Mexico, in said cause and matter, there is manifest error in this, to wit:

1. Error committed by the Supreme Court of the Territory of New Mexico in sustaining the motion made to quash the writ of *habeas corpus* issued in said cause, and to dismiss the petition of appellant praying for the issuing of said writ.

2. Error committed by said court in quashing the writ of *habeas corpus* issued in said cause upon the petition of the appellant.

3. Error committed by said court in dismissing the petition filed in said cause, praying for the issuing of a writ of *habeas corpus*, on the part of the appellant.

4. Error committed by the said Supreme Court of New Mexico in holding and deciding that, upon the facts stated and set forth in the petition filed in said court in said cause on behalf of the appellant, the appellant was legally confined and restrained of his liberty by the sheriff of Santa Fe county, New Mexico, and in refusing to discharge said appellant from such confinement and restraint.

Argument and Authorities.

The position taken by the appellant is, that the orders and judgment of the district judge were outside of and beyond his jurisdiction, and as a consequence the imprisonment of the appellant was and is illegal.

The statutes of New Mexico upon the subject of mandamus have the following provisions, as set forth in the Compiled Laws of 1884:

"§ 1992. The writ of mandamus is regulated as in this chapter prescribed.

"§ 1993. It may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of

an act which the law specially enjoins as a duty resulting from an office, trust, and station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion.

"§ 1994. The writ shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested."

"§1998. On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is served may show cause by answer, made in the same manner as an answer to a complaint in a civil action."

"§ 2000. No other pleading or written allegation is allowed than the writ and answer. They shall be construed in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action.

"§ 2001. If judgment is given for the plaintiff he shall recover the damages which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay."

The appellant contends that it is shown by the petition filed with the judge of the District Court, and upon which the writ of mandamus was issued, that the real controversy in the matter and cause was the right to the possession by the petitioners of offices to which they claimed to have been elected. If any doubt is left of that fact from the facts stated in the petition, such doubt is entirely removed by the statements in the answer of appellant, which stand uncontroverted.

Such petitioners had a plain, speedy, and adequate remedy in the ordinary course of law to obtain the possession of such offices if they were legally entitled to the same. Section 1230 of the Compiled Laws of the Territory provides:

"All contests for the offices of the officers of the different counties in this Territory shall be commenced in the

district court for the county in which the contest is made; and the notice of contest shall be filed within sixty days after the day on which the county commissioners count the votes of the election from which the contest arises; and the service on the *contested* shall be made by a copy of said notice of contest, served in the same manner and at the same time, before the first day of the court, as now provided by law for the service of process in civil suits in the district court."

Ample remedy is given by the statutes of the Territory to try the right to the election to an office, and persons claiming to be entitled to the possession of an office can always assert such right by the well-known common law remedy of writ of *quo warranto*.

When there is a plain, speedy, and adequate remedy at law, it is not proper to resort to the extraordinary remedy of mandamus. (People *v.* Olds, 3 Cal., 167.)

Title to an office cannot be tried in an application for a writ of mandamus.

People *v.* Olds, 3 Cal., 167.
Meredith *v.* Board, 50 Cal., 433.
Matter of Gardner, 68 N. Y., 467.
French *v.* Cowan, 79 Me., 426.
State *v.* Dunn, 12 Am. Dec., 25, and note on p. 28, and the cases there cited.

When the right of the person asking for a writ of mandamus appears to be doubtful the writ will not be granted. (People *v.* Supervisors, 36 Mich., 377.)

The answer filed by the appellant set forth such facts, which, if true, showed that the petitioners had no rights or claims whatever to the offices which they were seeking to obtain, and the facts stated in the answer must be taken as true until disproved. (People *v.* Supervisors, 36 Mich., 377.)

The appellant was commanded by the peremptory writ of mandamus to perform acts that were beyond his power to perform, and acts which might become unlawful for him to perform. The commands of such writ are as follows:

That "you produce the books of the Board of County Commissioners of Santa Fe county, and to record therein the records of the meeting of such board, and the proceedings thereof, held on the 2d day of January, 1891, and record in said records of minutes and proceedings the record of minutes of all other meetings heretofore had by the Board of County Commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex-officio* clerk of the Board of County Commissioners of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a Board of County Commissioners of the county of Santa Fe * * * and that you recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful County Commissioners of Santa Fe county, and as composing the only lawful Board of County Commissioners of said county," etc. (See pages 7 to 12 of the printed record for the writ [pages 6 to 11 MS.])

The effect of this writ, if complied with, would have been to require the appellant to oust from office two persons who were actually performing their duties as members of the Board of County Commissioners, and who had actual possession of their offices, and who were not parties to the proceedings, and to put into office three persons who, according to the facts set forth in the answer of appellant, were never in the possession of such offices, and who had no title thereto.

The writ also requires the appellant to recognize Staab, Garcia, and Nesbitt as the Board of Commissioners of the county for all future time, no matter what might be the result of any proceedings instituted to test the right to such offices. It was utterly impossible for the appellant to have reported to the judge that he had fully complied with the terms of this writ, for its commands are continuing.

Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It must be shown that the respondent is actually in default when the application for the writ is made. (High's Extraordinary Legal Remedies, sec. 12.)

The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform.

Ibid, sec. 36.

State *v.* Gracey, 11 Nev., 223.

A writ of mandamus must be enforced in the terms in which it is issued, or not at all. If the writ exceeds the limits of the legal obligation imposed upon the respondent the writ will be void.

High's Ex. Legal Rem., sec. 539.

Hartshorn *v.* Assessors, 60 Me., 276.

The commands of the writ being in excess of the jurisdiction of the judge the writ is void. It does not follow, because a court may have jurisdiction over the subject-matter and of the person, that the court will have jurisdiction to render any kind of a judgment. This court,

in the case of *Ex Parte* Lange, 18 Wall., 163, in considering the jurisdiction of courts, on page 176 of the report, by Miller, J., used this language:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void."

In delivering the opinion of this court in the case of Windsor *v.* McVeigh, 93 U. S., 274, where the question of jurisdiction was under consideration, Mr. Justice Field, on page 282 of the report, used the following language:

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and can not transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." (See also People *ex rel.* Tweed *v.* Liscomb, 60 N Y., 559.)

No person can be punished for contempt in the disobedience of a void order. (Brown *v.* Moore, 61 Cal., 432.

See also Kilbourn *v.* Thompson, 103 U. S., 168. *In re* Ayers, 123 U. S., page 443.)

The peremptory writ of mandamus was void, because issued in vacation. Section 2000 of the Compiled Laws of the Territory, hereinbefore set out, requires that the issues joined shall be tried in the same manner as in a civil action. This could only be done in term time, and the parties would be entitled to a jury. By section 1 of the act of the Territorial Legislature, set out on page 289 of the acts of 1889, the terms of the District Court are fixed; and as to the county of Santa Fe it is provided: "In the county of Santa Fe, on the first Monday in February and the last Monday in July." It will thus be seen that all the proceedings in the cause were had in vacation.

The action of the district judge in committing the appellant to prison for failing to obey the writ of mandamus was beyond his jurisdiction and void. The statute of the Territory prescribes the penalty in such cases, and is found in section 2002 of the compiled laws of 1884, which is as follows:

"Whenever a peremptory mandamus is directed to a public officer, body, or board, commanding the performance of any public duty specially enjoined by law, if it appears to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court may impose a fine, not exceeding $250, upon every such officer or member of such body or board; such fine, when collected, shall be paid into the Territorial treasury, and the payment of such fine is a bar to an action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined."

Under the well-settled rule for the construction of statutes, the Legislature, by providing a penalty and punishment for a disobedience of the commands of a writ or

mandate, has impliedly excluded all other penalties or punishments.

By this statute the punishment must be assessed by the *court*, and not by a judge in vacation.

See the case of State *v.* Stevens (Kan.), reported in 19 Pacific Reporter, 365, where a similar question under a similar statute was considered.

Where the statute specifically describes an offence and specifically prescribes the punishment therefor, all other kinds and degrees of punishment are excluded and unauthorized. (Haney *v.* Wisconsin, 5 Wis., 529.)

This is true, also, in matters of contempt. (Bickley *v.* Commonwealth, 2 J. J. Marshall (Ky.), 572.)

The provisions of the code upon the subject of contempts are a limitation upon the power of the court to punish for any other contempts. (Dunham *v.* Iowa, 6 Iowa, 245.)

The court is respectfully referred to the dissenting opinion of Chief Justice Obrien, of the Supreme Court of the Territory of New Mexico, which is printed on pages 45 to 51, inclusive, of the record.

It is respectfully submitted that order and commitment issued thereon for the confinement of the appellant in the jail of Santa Fe county were and are void, and that the restraint of the appellant is illegal.

C. H. Gildersleeve,
Wm. M. Springer,
Of Counsel for Appellant.

No. 1648.

Supreme Court of the United States.

OCTOBER TERM, 1890.

PEDRO DELGADO, *Appellant*,

vs.

FRANCISCO CHAVES, *Appellee*,

Appeal from the Supreme Court of New Mexico.

Now comes the said appellant at the closing of the argument in the above cause and moves the Court to make an order admitting the appellant to bail in such amount as the Court may deem reasonable.

WM. M. SPRINGER.

C. H. GILDERSLEEVE.

THOMAS SMITH.

Att'ys for Appellant.

Office Supreme Court U. S.
FILED.
APR 24 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890

PEDRO DELGADO, *Appellant*,	No. 1648.
vs.	Appeal from the Supreme Court of New Mexico.
FRANCISCO CHAVES, *Appellee*,	

Authorities cited by Council for Appellant in argument and not contained in Brief.

Supreme Court may, in the exercise of its appellate power, by writ of *habeas corpus*, issued by it or upon appeal from action upon such writ issued in a Territory, revise the decision of the lower court, and if it be found unwarranted by law, relieve a prisoner from unlawful restraint.

Ex parte Yerger, 8 Wallace, p. 85 ;
Ex parte Seibold, 100 U. S., p. 371 ;
Ex parte Rowland, 104 U. S., p. 604 ;
Ex parte Crow Dog, 109 U. S., p. 556 ;
Ex parte Fisk, 113 U. S., 713 ;
Ex parte Snow, 120 U. S., 274 ;
Ex parte Bain, 121 U. S., 1 ;
In re Ayres, 132 U. S., 443 ;
Gon-Shay-Ee, 130 U. S., 343 ;
Hans Nelson Petitioner, 131 U. S., p. 126 ;
See, also, in this connection, 60 N. Y., 559.

1. Where there is a plain, speedy and edequate remedy at law it is not proper to resort to the extraordinary remedy of mandamus.

See section 1994 compiled laws of New Mexico.

Ex parte Rowland 104 U. S., p. 617;
High on Extraordinary Legal Remedies, § 450.
3 B. & Alderson, p. 224.

2. Title to an office cannot be tried in an application for a writ of Mandamus.

Wood on Mandamus;
17 Howard, 305;
1 Nebraska, 172;
High on Extraordinary Legal Remedies, § 49;
People vs. *Forquer*, Breese (Illinois) p. 104.
18 Mich., 338;
55 N. Y., p. 252;
70 N. C., p. 93;
3 John's Cases, 79.

Statements in answer to writ of Mandamus must *be* taken as true, if not controverted.

Ex Parte Rowland, 104 U. S. p. 615;
High on Ex. Le. Rem., § 462;
Wood on Mandamus, p. 29-30, and authorities cited;
4 Pet., p. 106.

The Court will not pass upon the rights of third persons in a proceeding, in which they are not parties.

High Ex. Legal Remedies, § 39 & 50 & 53;
Breese (Ill.) 104, *People* vs. *Ferquer*;
7 Pa. States., 42;

5 Wallace, 563;
3 Johnson Cas., 79;
5 Wall., p. 563;
5 Rawle, 75.

5. The question is not whether the officer, invested with discretionary power, acted wisely or unwisely, but whether he has acted at all.

Wood on Mandamus, p. 51, bottom and over.
4 Wallace, 522.

6. Mandamus will not issue, where there is good reason on the part of the defendant, for not doing the act.

32 Barb., 612.
27 " 562.
37 " 440.
23 " 338.

7. Duty whose performance it is sought to coerce by mandamus must be actually due and incumbent.

15 Q. B., 92.
95 Mo., 541.
4 Wallace, 522.

8. When material facts appear to be in dispute between the parties, an issue is formed for trial upon evidence.

Sections 1999 and 2000 Compiled Laws of New Mexico.
Wood on Mandamus, p. 17.
Wood on Mandamus, p. 30-1.

Contempt.

If the command of the writ was unwarranted by law the proceedings for contempt, in not obeying it, were void.

Exparte Rowland, 104 U. S., p. 617–18.
Exparte Fisk, 113 U. S., p. 718.
Haines vs. *Haines*, 36 Mich., p. 143.
Perry vs. *Nutshell*, 5 Davis, p. 537.
Batchelder vs. *Moore*, 42 Cal., p. 414, bot.
People, &c., vs. *Jacobs*, 66 N. Y., p. 10.

Court had no authority to issue attachment for contempt, and take the body of the accused in vacation, unless authority is expressly conferred by statute, and no such statute exists in New Mexico

Rafalje on Contempt, 58.
2 *Black* (Md), p. 365.
9 *Pacific*, Rep., p. 383.
45 *Barbour*, (N. Y.,) 344.

Court had no authority to imprison accused for alleged contempt, as the statute prescribes the punishment for contempt, and limits it to a fine.

§ 2002 compiled laws of New Mexico.
19 *Wallace Exparte*, Robsinon, p. 512.
40 *Kansas*, page 116, *et seq.*

The following act omitted from the brief by mistake and referred to in argument, is herewith submitted.

Sessions Laws of New Mexico, 1886-7, p. 211.

Practice Civil.

AN ACT AMENDING SECTION 2060 OF THE COMPILED LAWS OF THIS TERRITORY.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. That Section 2060 of the compiled laws, as compiled in accordance with the act of the legislature, approved April 3rd, 1884, be and the same is hereby amended so as to read as follows: Trial by jury may be waived by the several parties to any issue of fact in the following manner:

1st. By suffering default, or by failing to appear at the trial;

2nd. By written consent, in person or by attorney, filed with the clerk;

3rd. By oral consent in open court, entered in the record.

Upon the trial of any question of fact by the court, its decision must be given in writing, and filed with the clerk in the cause, and in such decision the court shall find the facts, and give its conclusions of law pertinent to the case, which must be stated separately; but the finding of facts and the giving of conclusions or law may be waived by the several parties to the issue, by suffering default or by failing to appear at the trial, or by consent in writing, or by oral consent in open court, entered in the record. And upon the trial of any cause by the court, without a jury in common law cases, each

party shall have the right to make all objections and take all exceptions that he might have made or taken, as if the trial had been before a jury; and upon a review, by writ of error, in the supreme court, or by appeal, the said supreme court shall hear and determine the said cause in the same manner, and with the same effect, as if it had been tried before a jury.

SEC. 2. This act shall be in force and effect from and after its passage.

Filed by the Governor, February 24, 1887.

WM. M. SPRINGER,
C. H. GILDERSLEEVE,
THOMAS SMITH,
Attys. for Appellant.

Office Supreme Court U. S.
FILED.
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CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1648.

PEDRO DELGADO, APPELLANT,

vs.

FRANCISCO CHAVEZ, SHERIFF OF SANTA FÉ COUNTY, TERRITORY OF NEW MEXICO.

POINTS AND AUTHORITIES IN BEHALF OF APPELLEE.

Appeal from the Supreme Court of the Territory of New Mexico.

JNO. H. KNAEBEL,
Of Counsel for Appellee.

E. L. BARTLETT,
Solicitor General.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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POINTS AND AUTHORITIES IN BEHALF OF APPELLEE.

Appeal from the Supreme Court of the Territory of New Mexico.

NOTE.—The "statement" prefacing the appellant's brief being somewhat meagre, and perhaps too partial, the appellee refers to the petition, alternative writ, peremptory writ, and final orders as presenting the necessary data for this argument.

FIRST POINT.

As to the Nature of Appellant's Contempt.

The commitment for the appellant's contempt of the district court in his refusal, contumaciously repeated *in facie curiæ*, to obey the plain and lawful mandate of that tribunal was a mere coercive measure in aid of the execution of that mandate, and was not the infliction of a penalty. The appellant was jailed, but his own will was the key of the jail and he was his own jailer.

Rapalye on Contempt, § 11.
Cromartie v. *Commissioners*, 85 N. C., 211–215.
Ex parte Edwards, 11 Fla., 174–186.
Ex parte Renshaw, 6 Mo. App., 474–477.

This Court, by Mr. Justice MILLER, said, *In re* Chiles, 22 Wall., at page 168, that the exercise of the power to punish for contempt "has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to *compel his performance* of some act or duty required of him by the court, which he refuses to perform. * * * In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

The present case falls within this second classification of contempts, but it involves no fine and looks merely to the coercion of *obedience*. The appellant is, *in custodia legis*, the mere instrumentality of the law in the attainment of a legal end judicially sought, but which cannot be reached without his will and deed. Such will and deed are not matters of personal privilege, but matters of official duty. As to them, he is a trustee for the society of which he is a member, and he has no more right to refuse to yield them than he would have to conceal public records or property from the people.

SECOND POINT.

As to the Power of the District Court to Order the Commitment.

The district courts of New Mexico are superior courts of general jurisdiction created by the organic act, which is the territorial constitution. By virtue of this constitution they have inherent powers superior to any authority of the territorial Legislature, and which cannot be impaired by legislative action, except that of Congress. One of these inherent powers is the power to maintain their dignity and authority by enforcing decorum in the judicial presence and obedience to the judicial commands.

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the *enforcement* of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power."

Ex parte Robinson, 19 Wall., 505–510.
Ex parte Bollman, 4 Cranch, 75–94.
U. S. v. *Hudson*, 7 Cranch, 32.
Anderson v. *Dunn*, 6 Wheat., 204–227.
Ex parte Terry, 128 U. S., 289–303.
Ex parte Savin, 131 U. S., 267.
Ex parte Cuddy, 131 U. S., 280.
Ellenbecker v. *Plymouth Co.*, 134 U. S., 31–37.
Cartwright's Case, 114 Mass., 230–238.

The Legislature of New Mexico has never attempted to abridge this power in its relation to the enforcement of judicial orders, and had it made the attempt its action would have been unconstitutional and void.

Rapalye on Contempt, § 11.
Arnold v. *Commonwealth*, 80 Ky., at page 302.
See *Ex parte* Robinson, 19 Wall., at page 510.

Indeed, the territorial Legislature has not assumed in any manner to disturb this power, except in cases of breach of decorum in open court, as to which it has attempted to restrict its exercise.

The statutory provisions are found in the Compiled Laws (§§ 664, 665) and are as follows:

"§ 664. It shall be within the power of each and every presiding officer of the several courts of this Territory, whether of record or not of record, to preserve order and decorum, and *for that purpose* to punish contempts by reprimand, arrest, fine, or imprisonment, being circumscribed by the usage of the courts of the United States.

"§ 665. No judge of the district court shall fine any person for contempt or want of respect for the court in a sum exceeding fifty dollars without a trial by jury."

As to § 665 (*supra*) Associate Justice FREEMAN very properly says (*In re* Sloan, 25 Pac. R., page 944):

"But I do not agree with the learned counsel for the relators that the section referred to was intended to operate as a limitation upon the right of the judge to imprison or fine for a contempt of court committed in a refusal to obey one of its mandates. On the contrary, I am satisfied that this statute relates alone to the preservation of order and decorum in the presence of the court."

On the contrary, as early as July 12, 1851 (Session Laws, 1851, page 144, § 16), the common law on this subject was adopted and declared by the Legislature in an enactment now compiled as § 1832 of the Compiled Laws, namely:

"§ 1832. It shall be the duty of any judge to cause [the] judgment, sentence, or decree of the court to be carried into effect according to law."

In *People* v. *Nevins*, 1 Hill, at page 163, Judge Cowen says:

"And we have the authority of no less a man than Lord Hardwick for saying that when an *order to stand committed*

is pronounced after actual sentence for contempt against one in court he is *instantly a prisoner*, and the warden may take him to jail directly."

Whitechurch's Case, 1 Atk., 57.
4 Bl. Com., 287.

THIRD POINT.

As to the Finality of the Order of Commitment.

In *Ex parte* Fisk, 113 U. S., at page 718, Mr. Justice MILLER said:

"There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this Court; nor is there in the system of Federal jurisprudence any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

It is a principle deeply imbedded in the common law of judicature, and quite familiar.

Ex parte Terry, 128 U. S., 289, 306.
Ex parte Kearney, 7 Wheat., 38, 43.

In *Ex parte* Kearney (7 Wheat., at page 43) Mr. Justice STORY said:

"So the law was settled upon full deliberation in the case of *Brass Crosby, lord mayor of London*, 3 Wilson, 188."

FOURTH POINT.

The Judgment of the District Court was not Assailable Collaterally.

While the rule is justifiably established that an appellate tribunal may, under the writ of *habeas corpus*, especially when it accompanies the writ of *certiorari*, question the jurisdiction of a tribunal subordinate to itself, even though such subordinate tribunal be a court of general jurisdiction, there is no political justification for the extension of this rule to courts or magistrates not exercising such appellate jurisdiction, and whose judicial standing is only equal with or perhaps inferior to that of the court whose jurisdiction is collaterally brought in question; and the writ in the present case was not issued by the supreme court of the Territory, under its appellate power (in which event the writ of *certiorari* would have been necessary), but it was issued as matter of original power, under the territorial *habeas corpus* act, which, in such case, puts the supreme and district courts and the several judges thereof as judicial officers or magistrates, and even assumes to put *justices of the peace* all on the same footing.

Comp. Laws, § 2012 *et seq.*

Laws 1889, ch. 89, page 207.

I. While even an appellate tribunal will, in the exercise of its reviewing power by *habeas corpus*, confine itself to the question of *jurisdiction* in the court below and decline to accord to the writ of *habeas corpus* the office of a writ of error (Wales *v.* Whitney, 114 U. S., at page 571), yet, because of its appellate power, it will sometimes go behind the face of the record upon which the imprisonment complained of is based and take notice of a lurking jurisdictional defect not *prima facie* disclosed.

Ex parte Lang, 18 Wall., 163.

But a co-ordinate or inferior tribunal or magistrate would not have this searching power of inquiry. Collaterally assailed before authority of that character, a judgment of a superior court, rendered in the exercise of its general jurisdiction, imports *absolute verity*.

Co. Lit., 260 *a*.

Such a court is, at least, as competent to pass upon its own jurisdiction as any of its judicial peers or inferiors.

Notwithstanding the clamor of wayward enthusiasts, who have magnified the office of the writ of *habeas corpus*, even to the degradation of the highest courts, it was held by this Court that the very nature of our Government excludes all the State tribunals from examining by *habeas corpus* cases of imprisonment under authority or pretense of authority of the United States.

Tarble's Case, 13 Wall., 397.

This political principle is easily understood. It is more important to the nation than the occasional inconvenience of an individual citizen. But almost equally important are the certainty and integrity of jurisdiction of the superior courts. Outside of all questions of judicial comity, it is disturbing and scandalous to permit a collateral authority of only equal or even inferior dignity to destroy in a summary *ex parte* proceeding the effect of a solemn judgment, which may be the result of a long and exhaustive investigation by a learned and conscientious court of all jurisdictional and other questions involved. It is a solecism to say that such collateral examination of questions already competently examined is either judicial or decorous.

Regina v. *Paty*, 2 Ld. Raym., 1105.

Mayor of London's Case, 3 Wils., 188.

People v. *Nevins*, 1 Hill, at pages 161 to 166.

This Court said, by Mr. Justice BALDWIN, in *Grignon* v. *Astor*, 2 How., at page 341:

"The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court and those whose proceedings are nullities if their jurisdiction does not appear on their face is this: A court which is competent by its constitution *to decide on its own jurisdiction* and to exercise it to a final judgment without setting forth in the proceedings the facts and evidence on which it is rendered, *whose record is absolute verity*, not to be impugned by averment or proof to the contrary, is of the first description. *There can be no judicial inspection behind the judgment save by appellate power.*"

Again, in *Ex parte* Watkins, 3 Pet., at page 207, this Court said, by Chief Justice MARSHALL:

"It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the Court. The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this Court the power of reversing its decisions. We cannot usurp that power by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied."

This case is cited in *Ex parte* Yarborough, 110 U. S., at page 654, and in *Ex parte* Parks, 93 U. S., at page 23.

See also *McCormick* v. *Sullivant*, 10 Wheat., 192; *U. S. Bank* v. *Moss*, 6 How., 39; *Kennedy* v. *Georgia State Bank*, 8 *id.*, 586; *Huff* v. *Hutchinson*, 14 *id.*, 586.

Judge HUGHES says, in *Moch* v. *Virginia Fire and Marine Ins. Co.*, 4 Hughes, 61, at page 122:

"If the court of general jurisdiction in rendering a judgment has passed expressly upon the jurisdictional facts and found them sufficient, the parties and the privies are estopped in collateral actions to litigate the matter again," citing *Sheldon* v. *Wright*, 5 N. Y., 497; *Dyckman* v. *New York*, 5 N. Y., 434; *Segee* v. *Thomas*, 3 Blatch, 11; *In re* Cuddy, 131 U. S., 280.

This certainly ought to be deemed the law as to such adjudications when rendered by the superior tribunals of the State or Territory in which the collateral attack is made. Judicial statics, so to speak, suggest this. If a court of such dignity finds the needed jurisdictional facts to exist and passes its judgment accordingly, how can it be said that any collateral court or judge of jurisdiction not superior, and perhaps quite inferior, has sufficient judicial *weight* to outbalance the weight of the court which had first assumed jurisdiction? Is infallibility to be predicated of the collateral critic, but not of the exalted court which he arraigns?

The *habeas corpus* statutes give attention to this difficulty by their almost universal provision that a person brought up on *habeas corpus* shall be remanded if it appear that he is confined under the authority of a competent court, as, for instance, the very statute under which the present proceeding arises. (*Comp. Laws*, § 2027, viz:)

"§ 2027. The officer shall forthwith remand such party if it appears that he is detained in custody, either—

"*First.* By virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; or,

"*Second.* By virtue of the final judgment or decree of any competent court or of any execution issued upon such judgment or decree; or,

"*Third.* For any *contempt* specially and plainly charged in the commitment by some court officer or body having authority to commit for the contempt so charged; and,

"*Fourth.* That the time during which such party may be legally detained has not expired."

Also—

"§ 2028. If it appears on the return that the prisoner is in custody by virtue of civil process of any court legally constituted or issued by an officer in the course of judicial proceedings before him authorized by law, such prisoner can only be discharged in one of the following cases:

"*First.* When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person.

"*Second.* When, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterward, the party is entitled to be discharged.

"*Third.* Where the process is defective in some matter of substance required by law rendering such process void.

"*Fourth.* Where the process, though in proper form, has been issued in a case not allowed by law.

"*Fifth.* Where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; or,

"*Sixth.* Where the process is not authorized by any judgment, order, or decree of any court nor by any provision of law.

"§ 2029. But no officer on the return of any *habeas corpus* can inquire into the *legality* or *justice* of any judgment, decree, or execution specified in the section 2013."

The section (§ 2013) last referred to is:

"§ 2013. The following persons are not entitled to prosecute such writ: Persons committed or detained by virtue of the final judgment, conviction, or decree of any competent tribunal or by virtue of an execution issued upon such judgment or decree; but no order of commitment for any alleged contempt or upon proceedings as for contempt to enforce the rights or remedies of any party shall be deemed a judgment, conviction, or decree within the meaning of this section; nor shall any attachment or other process issued upon any such order be deemed an execution within the meaning of this section."

Thus it appears that the judgment in mandamus was expressly exempted from any collateral inquiry under the writ of *habeas corpus* in respect of its "legality" or "justice;" and

yet the appellant asks such inquiry, well knowing that if the judgment cannot be impeached in this proceeding the order for his commitment is unassailable.

These sections ought, of course, to be read in connection with the provision of the organic act providing appeals and writs of error as the modes of reviewing judgments.

9 St., page 447, § 10.

It may be said that such judgments are and of right ought to be more conclusive in their relation to *ex parte* attacks by *habeas corpus* than they are in their relation to formal collateral controversies in regular course of judicial procedure in competent tribunals between the original parties or their privies. Hence peculiar cases may be found in which such judgments have, on jurisdictional grounds, been successfully assailed collaterally in new suits between such parties or privies, although they would have been held impregnable by assault *ex parte* in a *habeas corpus* proceeding based on a bodily restraint resulting from their enforcement. However sacred the right of the citizen to defend himself against unconstitutional laws and judicial usurpations, equally sacred is the requirement of the law that he shall pursue legal methods in his defense. It is, or ought to be, the policy of the law to exact of defendants complaining of the solemn judgments of a superior court that they seek judicial relief in an orderly manner by appealing to the appellate tribunals in due form without attempting to gain the advantage of a reversal on appeal by a complaint before an equal or inferior collateral authority.

Indeed, this Court, invested with majestic judicial power and always solicitous to vindicate individual rights to liberty, is more tender of the principle above advocated, of judicial propriety and comity, than the inferior courts and magistrates, who are so prone to abuse their authority in matters of *habeas corpus*, and accordingly it has repeatedly declined jurisdiction by *habeas corpus* until the party com-

plaining should have exhausted his remedy in the local tribunals by appeal or writ of error from the judgment upon which the imprisonment, alleged to be without jurisdiction, occurred.

Ex parte Royall, 117 U. S., 241–250.

In *Ex parte* Fonda, 117 U. S., 517, this Court said, at page 518:

"No reason is suggested why the supreme court of the State may not review the judgment of the circuit court of the county upon the question which is raised," &c. * * * "The case, as made by the motion papers, is not one which under the principles settled in *Royall's case* requires this Court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error."

Wales v. *Whitney*, 117 U. S., 564.
Ex parte Mirzan, 119 U. S., 583.
In re Huntington, 137 U. S., 63.
In re Lancaster, 137 U. S. 393.

"Where a defendant has been arrested and imprisoned in a civil case by virtue of a warrant issued by the judge of a court of general jurisdiction another court or judge will not disturb the commitment if the judge making it had *colorable jurisdiction*."

Church on *Habeas Corpus*, § 238.

This proposition was declared by the supreme court of New York in a case wherein it was applied to for the writ of *habeas corpus*.

In re Prime, 1 Barb., 340.

"And even proceedings for a review by the supreme court [of a State] to investigate that question [jurisdiction] ought not to be entertained, because the commitment was made by a court of general jurisdiction, and the jurisdiction of those courts will always be presumed."

Church, § 238, page 304.

"In some of the States the supreme court, the superior or district courts, and other courts of general jurisdiction are all on the same base, so far as their authority, power, or jurisdiction is concerned, relative to proceedings on *habeas corpus*. [And this is true in New Mexico, under its *habeas corpus* act, as to *original* jurisdiction. See *infra*.] They have the same powers, the same authority, the same jurisdiction.

"The statute has invested them all with the same panoply of power, and neither sustains to the other the relation of a superior or an inferior court in the same sense that a district, superior, or supreme court is superior to a court of the justice of the peace or other court of special and limited jurisdiction. The word 'superior' or 'inferior' can with no propriety be applied to the jurisdiction exercised by either. It is in each the same, one and identical. Therefore to ask one if these tribunals to review the commitment made by another would be in reality a sort of collateral appeal from a jurisdiction to itself.

"And where the officer returns such a commitment or the warrant upon which he holds the party, if the warrant is good upon its face, the inquiry should extend no further, because the commitment has been made by a court of general jurisdiction, and one court of general jurisdiction should not review the proceedings of another on the writ of *habeas corpus*. The principles of comity should prevail." (*Ib.*, § 238.)

This conflict of jurisdiction should be avoided, as well in the determination of jurisdictional errors as of minor judicial errors, and the following cogent remarks of Judge SANDERSON in *Ex parte McCullough* (35 Cal., pages 100, 101) are as applicable in the one case as in the other:

"Establish the doctrine that the judgments and orders of court may be reviewed on *habeas corpus* upon the ground of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action, in which an arrest is given and every proceeding for a contempt could be brought to the Supreme Court by writs of *habeas corpus*. Not only that, but, as already suggested, inferior tribunals would be called upon to review the judg-

ments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would render all judicial proceedings amorphous and lead to the utmost confusion and disorder. It is well settled that *habeas corpus* can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody, under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued and the validity of the process upon its face."

This pretended power, when exercised by a magistrate, would lead to the abuses denounced by Chief Justice KENT in *Yates' case* (4 Johns., at page 357):

"Such a power would be dangerous as well as unprecedented. A single judge of this court [supreme court of New York] might in that case annul the decision of the rest of the court by discharging, in vacation, a person committed by the judgment of the court. A power of this extent would ride over all the courts of the land, and become perfectly despotic, if it was not subject to review and correction."

The anomaly of its exercise is made apparent by what he adds:

"There are numerous instances in which the court of K. B., and some cases in which the court of C. B., has, upon *habeas corpus*, undertaken to examine and decide upon the cause and the authority for the commitment by another court. But in all those cases the *habeas corpus* was awarded by the *court*, and returnable therein; and except in a few anomalous cases in the time of James I, and of which I shall take notice hereafter, the examination into the authority of the court to commit arose upon commitments by some *inferior* court. [Here he cites thirteen cases.] They were all cases of *habeas corpus*, at common law; and I apprehend that there is not an instance in the English law of a judge in vacation undertaking to decide upon the legality of a commitment in execution by the judgment of any court of record, and much less of a court of the highest degree."

See remarks of GIBSON, C. J., in *Commonwealth* v. *Lecky* (1 Watts, at page 68.)

And the unseemly judicial conflict otherwise inevitable between the lower authority and the higher can have but one outcome; for the superior courts always have at hand a *lex talionis* in the form of *prohibition*. It is absurd for a mere subordinate authority to question the judicial judgment of a power which has jurisdiction to command its silence. Irresistible judicial power imports complete jurisdiction.

II. It was competent for the territorial Legislature to pass its *habeas corpus* act and regulate the practice under it. Such a Legislature can confer original jurisdiction in *habeas corpus* cases upon the Supreme Court (*Clough* v. *Curtis*, 134 U. S., 361). Probably the organic act itself invested that court with original jurisdiction; but, if so, the jurisdiction would be only such common-law jurisdiction as was described by Chief Justice KENT in the foregoing citation.

Under the territorial statute (Comp. Laws, § 2012 *et seq.*) the authorities designated to act are provided by § 2014, viz:

"§ 2014. Application for such writ shall be made by petition to any judge of the supreme court or any two justices of the peace of the county where the petitioner shall be in jail, signed and verified either by the party for whose relief it is intended or by some person in his behalf, as follows: To the supreme or district court or to any judge thereof being within the district where the prisoner is detained, or if there is no such officer within such district, or if he is absent or from any cause is incapable of acting or has refused to grant such writ, then to some officer having such authority residing in any other district."

And chapter 89 of the Laws of 1889 (*ib.*, page 207) provides an amendment as follows, viz:

"SECTION 1. That section two thousand and fourteen of the Compiled Laws of 1884 of this Territory be, and the same hereby is, amended where the same refers to justices of the peace so as to read as follows: Application for such

writ shall be made by petition to any judge of the supreme court or any three justices of the peace of the county in which the beneficiary of the application is detained of his liberty, signed and verified either by the party for whose benefit it is intended or by some person in his behalf, and if such application is made to justices of the peace, then the applicant shall state in his petition the time and place where the writ is to be returnable, which must be at the office or in the house or in the precinct of some one of said justices; and at such designated time and place such justices shall sit together as a court or examining body and hear and determine said cause, and a majority vote shall govern.

"SEC. 2. Nothing in this amendment shall be construed so as to change or affect the law as it now stands when such application is made to a judge of the supreme court.

"SEC. 3. Should any of said justices, after a proper application being made therefor as aforesaid, refuse to sign or grant said writ or, after signing the same, refuse or neglect to attend at the examination, such justice shall be subject to the same pains, fines, and penalties now prescribed by law to be imposed upon district or supreme judges for refusing to grant a writ of *habeas corpus*."

All the succeeding sections of the act (Comp. Laws, § 2015, &c.) relating to procedure under the writ apply alike to all the courts and magistrates thus authorized to issue it.

It is evident from reading the act that it assumed to give equal jurisdiction to justices of the peace and to the supreme court, and therefore, even admitting that the provisions relating to justices of the peace are unconstitutional, the very fact that the kind of jurisdiction given by the act to the supreme court was deemed by the Legislature to be equally adapted to the authority of a district judge at chambers or a board of justices of the peace indicates that it was not intended to confer thereby power to adjudicate upon the jurisdiction of the courts of general jurisdiction.

It was not, for example, intended that either justices of the peace or district judges at chambers should determine in a *habeas corpus* case that the Supreme Court of the United

States or the supreme court of New Mexico had usurped a jurisdiction denied by the Constitution or the laws.

No appeal or writ of error having been taken from the district court for the review in the supreme court of the mandamus proceedings and the judgment founded thereon, and no bill of exceptions having been prepared or filed, and no *certiorari* sued out, the supreme court did not sit below in an appellate capacity, but only in the same capacity and with the same limits of jurisdiction as any district court or judicial officer would have had under the act had such district court or officer issued the writ under the terms thereof.

The effect of the statute (in itself merely declaratory of the common law on the same point) is to preclude collateral review of the judgment in mandamus.

In re Lybarger, 25 Pac. Rep., 1075.
In re Schenck, 74 N. C., 607.

FIFTH POINT.

This Court Ought to Decline Jurisdiction.

This Court has no jurisdiction of the principal case, wherein the peremptory writ of mandamus was issued, since it involves no adequate pecuniary consideration. That case remains in the district court. If it should ever be carried into the territorial supreme court for review, the decision of that court would be absolutely final, and its judgment would forever be an estoppel on all the parties. It is a case quite analogous to *Potts* v. *Chumasero*, 92 U. S., 358, in which this Court dismissed a writ of error to the supreme court of Montana.

Under such circumstances this Court ought to decline jurisdiction at present, on the same grounds upon which it proceeded in *In re* Huntington, 137 U. S., 63; *in re Lancaster*, *ib.*, 393; *Ex parte* Mirzan, 119 U. S., 583; *Wales* v. *Whitney*,

117 U. S., 564; *Ex parte* Fonda, *ib.*, 517, and *Ex parte* Royall, *ib.*, 241.

The finality of territorial jurisdiction in the principal case and the impossibility of any review in this Court of the judgment therein put the terriorial court in a like predicament with the State courts mentioned in those cases. Although this is a direct appeal, and in those cases the parties proceeded by motion in this Court for a writ, appellate jurisdiction was equally invoked by both methods of procedure.

Because it could not take jurisdiction of a case by direct appeal or writ of error, this Court declined to interfere collaterally by *mandamus*, in *In re* Burdett, 127 U. S., 771.

SIXTH POINT.

The Judgment in Mandamus is Jurisdictionally Perfect.

It appearing to the territorial supreme court that the district court had jurisdiction of the parties and subject-matter involved in the mandamus proceeding; that its award of the peremptory writ was within its jurisdiction; that it lawfully required obedience to the command of the writ, and that the measures taken to enforce such obedience were lawful, it was the duty of the supreme court to remand the prisoner "to be confined in the county jail until he purges himself of the contempt for which he was committed."

Trans., fol. 39, page 45.

The jurisdiction of the district court to issue the writ of mandamus was even clearer than that exercised by the supreme court of Montana in the case of *Chumasero* v. *Potts*, 92 U. S., 358. After this Court had dismissed the writ of error in that case, the members of the canvassing board having concern with the canvass of the votes on the ques-

tion of the removal of the capital of Montana from Virginia City to Helena obeyed the mandamus, and declared Helena to be elected as the capital; whereupon the removal took place. But suppose that the defendants in that case, after this Court had declined jurisdiction, had openly defied the territorial supreme court by refusing due obedience, and had been ordered to stand committed until they should purge themselves of their contempt, would this Court have listened with patience, upon the facts of that case, to a complaint that the supreme court was without jurisdiction?

It would have been more likely in such case to content itself with the construction given by the territorial court to the local practice act relating to mandamus, conformably to the doctrine of *Sweeney* v. *Lomme*, 22 Wall., 208. Manifestly there is an essential difference relatively to the remedy by *habeas corpus* between a case involving a criminal sentence or a judgment affecting the person, status, or property of a defendant or commanding him to do an impossibility, and a case involving simply the judicial ascertainment and declaration of a specific official duty and the judicial requirement of performance of that duty by the appropriate official. In the latter case it would seem that the absolute finality of the *res adjudicata* as to the duty ought forever to estop all parties bound by the adjudication from disputing in any collateral way the right to adjudicate.

"The relief granted upon *habeas corpus* against defective convictions and commitments is in some respects analogous to the relief obtained upon a writ of error. It is in one respect more desirable, because it is more prompt in relieving the prisoner from imprisonment; but, on the other hand, it *leaves the order or judgment of the court below in full force* and only discharges the party from the present effect of it."

KENT, C. J., 4 Johns., page 360.

So, the appellant, if discharged, would still have to pay any costs, if adjudged in the principal case, and the judgment would always remain as to him a judgment declaring

a duty and commanding its performance, but rendered impotent by the collateral action of another court incompetent to assail it for error!

Test the jurisdiction of the district court by the following rule laid down by this Court upwards of fifty years ago, in *U. S.* v. *Arredondo*, 6 Pet., at page 709:

"The power to hear and determine a cause is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action. If the petitioner states such a case on this petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."

Compare the petition for the alternative writ and also that writ with the sections of the territorial act under which they were framed, and it will be found that the court acquired thereby full jurisdiction of the case.

The act is in the compiled laws, viz:

"§ 1992. The writ of mandamus is regulated as in this chapter prescribed.

"§ 1993. It may be issued to any inferior tribunal, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, and station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion.

"§ 1994. The writ shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested.

"§ 1995. The writ is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act and his omission to perform it, and command him that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed or show cause before

the court out of which the writ issued, at a specified time and place, why he has not done so, and that he then and there return the writ, with his certificate of having done as he is commanded. The peremptory writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded shall be omitted.

"§ 1996. When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases the alternative writ shall be first issued.

"§ 1997. The court or judge, by an indorsement on the writ, shall allow the same, designate the return day thereof, and direct the manner of service.

"§ 1998. On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is served may show cause by answer made in the same manner as an answer to a complaint in a civil action.

"§ 1999. If no answer is made a peremptory mandamus shall be allowed against the defendant; if an answer is made containing new matter the plaintiff may, on the trial or other proceedings, *avail himself of any valid objection to its sufficiency*, or may countervail it by evidence either in direct denial or by way of avoidance.

"§ 2000. No other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action.

"§ 2001. If judgment is given for the plaintiff he shall recover the damages which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay.

"§ 2002. Whenever a peremptory mandamus is directed to a public officer, body, or board, commanding the performance of any public duty specially enjoined by law, if it appear to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court may impose a fine not exceeding two hundred and fifty dollars upon every such officer or member of such body or board; such fine, when collected, shall be paid into the territorial treasury, and the pay-

ment of such fine is a bar to an action for any penalty incurred by such officer or member of such body or board by reason of this refusal or neglect to perform the duty so enjoined.

"§ 2003. The district court has exclusive original jurisdiction in all cases of mandamus except where such writ is to be directed to a district court or judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction; and in such cases the supreme court or a judge thereof shall first make a rule returnable in term that such district court or judge thereof show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such rule such district court or judge may show cause against the rule by affidavit or record evidence, and upon the hearing thereof the supreme court shall award a peremptory writ or dismiss the rule. In case of emergency a judge of the supreme court at the time of making the rule to show cause may also appoint a special term of the court for hearing the motion and at which the rule shall be made returnable.

"§ 2004. An appeal lies in the supreme court from the district court in mandamus as in civil actions.

"§ 2005. For the purpose of hearing application for and issuing writs of mandamus *the district court shall be regarded as open at all times* wherever the judge of such court may be within the Territory."

The court was "open at all times" for the purposes of entertaining, hearing, determining, and enforcing the remedy invoked.

See section 2005 of the compiled laws last above cited; also—

"§ 1829. Hereafter the district courts held in the several counties of this Territory shall be at all times in session and open at any place in the district where the judge thereof may be for the purpose of hearing and determining motions, demurrers, and petitions, granting rules and orders and interlocutory decrees, perfecting pleadings and putting causes at issue in all causes in law and equity, and rendering final decrees in equity, as well as for granting all extraordinary writs and issuing every kind and class of process that could or might be issued by said courts at a regular term."

Jurisdiction of the person of the defendant below was duly acquired, for he was served with the alternative writ and he appeared and answered. (*Trans.*, fol. 12, page 13.)

The petition and alternative writ state a plain case, clearly within the jurisdiction of the court. Although a sufficient cause of action thus duly appears, that is an immaterial fact, for the court had *jurisdiction* to determine the question of sufficiency, and its decision of the point cannot be assailed collaterally any more than its decision upon the sufficiency of an indictment.

In re Converse, 137 U. S., 624.
In re Lane, 135 U. S., 443.
In re Coy, 127 U. S., 731.
In re Wight, 134 U. S., 136.
In re Grimley, 137 U. S., 147.
Ex parte Harding, 120 U. S., 782.
Ex parte Bigelow, 113 U. S., 328.
Ex parte Crouch, 112 U. S., 178.
Ex parte Parks, 93 U. S., 18.

For the purposes of the present collateral inquiry it is utterly immaterial and irrelevant what the defendant set forth in his answer or what records or other proofs were before the court or what else occurred in court up to the final judgment.

"Any movement by a court is the exercise of jurisdiction." (*Rhode Island* v. *Massachusetts*, 12 Pet., 718.)

And all the "movements" of the court were jurisdictional. Jurisdiction once acquired, it never was lost, unless (according to the modern theory) it was possible for the court to commit *felo de se* by the terms of its adjudication. Read, then, the judgment, and we find it in strict conformity with the petition and alternative writ. It is simply the final judicial adoption, authorization, and enforcement of the case made in the application for relief. Whatever is contrary in the defendant's answer has been lawfully held for naught

and is now to be ignored. He is estopped by the judgment from now controverting it by his answer. Right or wrong, the judgment is solemn, effective *coram judice.*

The appellant vainly asks this Court to declare it a void and trifling thing—*non coram judice.*

If the court died as a court before the judgment was pronounced or in its deliverance, then the judgment has no vitality, but if the court delivered the judgment under the jurisdiction which it had acquired it remains a solemn sentence; its command is the voice of the law. If part were bad and void, yet what remained of lawful import would not be vitiated, and the court could not safely be defied until the lawful part had been obeyed.

See, on this point, the opinion of the court below, *Trans.*, fol. 38.

As a rule, whenever in the court of original jurisdiction itself or in an appellate court acting in the direct line of review a judgment or decree excessive as to pecuniary amount or quantity of punishment or performance specifically directed can, by modification, be reduced to legal limits, the incidence of the excess does not oust jurisdiction, but rather suggests the exercise of jurisdiction for the correction of the error.

1. Where a judgment is excessive in amount, that error is a judicial error, and is remediable by the original court or its appellate supervisor, and the error may be corrected by eliminating the excess either absolutely or conditionally.

Bank of Kentucky v. *Ashley*, 2 Pet., 327.
Hopkins v. *Orr*, 124 U. S., 510.
Comp. Laws, § 2190.

2. Where decrees in chancery require too much from a defendant they are not void, but merely subject to judicial modification.

3. Where *punishment* adjudged in a criminal case is *excessive*, courts, original and appellate, having statutory power

to modify judgments (*e. g.*, this Court and the supreme court of New Mexico, *Comp. Laws* § 2190; 124 U. S., 510) may also eliminate from the case the judicial error of excess by reducing the punishment accordingly.

So this Court, when in a territorial case the sentence unlawfully added *hard labor* to an imprisonment, ordered a modification of the sentence.

Reynolds v. *U. S.*, 98 U. S., 145, and especially page 169.

People v. *Liscomb*, 60 N. Y., 559.

People v. *Baker*, 89 N. Y., 466, 467.

Ex parte Gibson, 31 Cal., 619.

4. And it is an inflexible rule that one complaining collaterally of excess in the terms of a judgment in mandamus, or even under the criminal law, must show performance of so much as was lawfully required of him before a court can interfere for his relief, the principle of the equitable maxim of reciprocal equities being applied.

Cases supra.

And therefore when this Court, by *habeas corpus*, has relieved from imprisonment for disobedience of judicial commands, so far as *impossible of performance*, in mandamus cases, it has always insisted that the prisoner show that measure of performance which was within his ability.

Ex parte Parks, 93 U. S., 18.

Ex parte Diebold, 100 U. S., 37.

Ex parte Clarke, *ib.*, 399.

Ex parte Rowland, 104 U. S., 604.

But we insist that the mandamus is unassailable, even in error.

Attorney General v. *Boston*, 123 Mass., 460.

SEVENTH POINT.

The Dissenting Opinion of the Chief Justice is Based on an Alleged Error of Procedure in No Sense Jurisdictional.

The resistance of the appellant to the command of the writ of mandamus is founded on a total misconception of the doctrine of jurisdiction, and the learned Chief Justice, in his dissenting opinion, has fallen into the same illogical predicament.

It could not be reasonably pretended that the petition for the writ, with the alternative writ issued thereon, failed to state a case both jurisdictional and legally sufficient, nor that the judgment or final order and the peremptory writ following it would have been unlawful, jurisdictionally or otherwise, had the defendant below made default or had he contented himself with a motion to quash the writ, which would have amounted to a demurrer; but both the Chief Justice and the counsel for the appellant appear to base their contention on the fact that the defendant interposed an answer purporting to deny the allegations of the alternative writ.

In his dissenting opinion the Chief Justice says (*Trans.*, fols. 47, 48):

"Without admitting or denying the validity of this writ I am clearly of opinion that Delgado's answer thereto raised a material issue of fact. The motion of the county commissioners to make the writ peremptory, notwithstanding the answer, was in the nature of a demurrer to its sufficiency, and the judgment of the court in granting that motion was in effect an order sustaining such demurrer. This, in my judgment, was *substantial error*, from the consequences of which Delgado cannot be relieved by appeal or writ of error. He is in jail and has no adequate remedy against such illegal imprisonment, unless it may be afforded him in this proceeding. * * * I hold, then, if substantial error, prejudicial to the rights and liberty of the petitioner herein,

appears upon the record of these proceedings that the same are reviewable, although contained in the final judgment declaring him in contempt."

In justice to the author I take these excerpts from the opinion as reported in the 25th *Pacific Reporter*, at page 953, instead of from the inaccurate copy printed in the transcript.

If the Chief Justice does not by the very words cited demonstrate that the alleged errors all occurred within the limits of jurisdiction, and are therefore reviewable only by a direct proceeding in error, I must humbly confess my intelligence to be inadequate to the comprehension of the bearings of this litigation. But I insist that the error of his opinion is too glaring to need any discussion for its exposure.

EIGHTH POINT.

All the Objections Raised Below are Untenable, even so far as Appropriate to a Direct Review.

The appellant, petitioning below for the writ of *habeas corpus*, was by the territorial statute required in his petition to state the specific grounds of his complaint. The compiled laws provide in § 2016—

"*Fifth.* If the imprisonment is alleged to be illegal the petitioner shall state in what the illegality consists."

Church, § 89.

Ex parte Deny, 10 Nev., 212.

He undertook to comply with this requirement by stating six specific grounds, which appear on page 30 of the transcript. These were the only grounds upon which the territorial supreme court was called upon to adjudicate. They are the only grounds of objection appearing in the record. On the present appeal this Court is limited to a consideration

of the decision made below on these grounds, and no new objection can by after-thought or expedient be now introduced into the case.

Such is the settled rule of this Court.

Roberts v. *Reilly*, 116 U. S., 80.
Spies v. *Illinois*, 123 U. S., 131, 181.
Baldwin v. *Kansas*, 129 U. S., 52.
Dahl v. *Montana Copper Co.*, 132 U. S., 264.

I shall notice in their order the six objections called to the attention of the court below. (Trans., page 30.)

1st. It was objected that the petition for the mandamus shows that "it was filed and such mandamus sought for the purpose of contesting the election of certain persons named in said petition, viz., Charles M. Creamer and Higinio Martinez, and who were not made parties to such petition, to the offices of members of the board of county commissioners of Santa Fé, and for the reason that the said judge of said district court was without power, authority, or jurisdiction to hear and determine such issue upon an application for a writ of mandamus."

The petition appears on pages 1 to 5, both inclusive, of the transcript. It does not contain a word to justify this objection. It does not refer to Creamer and Martinez except incidentally, in mentioning them as late candidates for the said offices; but it does duly allege that, upon the completion of the canvass of votes, it was found and declared that Garcia, Nesbitt, and Staab had been duly elected county commissioners, and thereupon a certificate of such election was duly issued to each of them (*ib.*, fol. 4). Under the laws of the Territory such a certificate, duly issued, is *prima facie* title to office, and is of probative force in every court. (*Comp. Laws*, § 1169: "If a contested election be pending, the person holding the certificate of election shall take possession and discharge the duties of the office until the con-

test shall be decided.") The county commissioners were authorized (*Comp. Laws*, § 345, subd. 9) as a board of canvassers of every election "to declare the result of said election," and immediately to "issue a certificate of election, under their hands, to the person that may have received the highest number of votes for any office."

The petition also states (*ib.*, folio 4, page 5) "that on the 2nd day of January, A. D. 1891, your relators, Abraham Staab, Juan Garcia, and William H. Nesbitt, the duly elected board of county commissioners of said county, having first had approved by this honorable court their official bonds in the sum of five thousand dollars, took the oath of office, and met in the court-house of said county of Santa Fé, and *duly organized* by electing your relator, Abraham Staab chairman of said board."

The section of the compiled laws as to the status and rights of a county commissioner under his certificate of election is as follows:

"§ 344. Each person elected as such commissioner shall, on receipt of a certificate of his election, take an oath to support the Constitution of the United States and the organic act of this Territory, and to discharge the duties of his office to the best of his ability, which oath, being endorsed on said certificate under the hand and seal of the person administering it, *shall be sufficient for such person to act* as such commissioner."

The petition further states (*ib.*) "that thereupon the said Abraham Staab, chairman of the said board of county commissioners, then and there called upon and asked the said Pedro Delgado, probate clerk as aforesaid, then and there acting as said clerk and in possession of the records, books, files, and papers of his office, to act as clerk of said board, as by law he is required to do," &c. (*Comp. Laws*, § 350.)

It appears also by the petition (*ib.*, pages 4 and 5) that Pedro Delgado himself had been elected such probate clerk at the same election, and that the same commissioners who

had issued certificates to the relators, having duly canvassed the votes cast for and against him, duly "declared him elected to said office and issued to him a certificate therefor."

Here is a clear showing of induction of the relators into their offices as county commissioners. They thus filled their offices, both *de jure* and *de facto*. Their official bonds had even been approved by the very judge to whose court they afterwards applied for relief. (Laws of 1887, ch. 8, page 21.)

There is not even an intimation of an election contest. The sole purpose of the application was to call on the clerk of the board to perform specific legal clerical duties within his power. Other pretenders to the office of commissioner were not concerned in the proceeding. The clerk was not their lawful champion. If they have any litigable claims, the courts are open to them; but as to them this is *res inter alios acta*.

Sometimes at common law ministerial officers were annoyed by rival claims to their service and even subjected to contradictory writs of mandamus; yet the Court of King's Bench held that it was the duty of such officials to obey all the writs. (*Rex* v. *Harris*, 3 Burrows, 1420.)

The case made by the petition for the writ disclosed no contest for the offices of county commissioners; no actual filling of the offices except by the relators; no litigated "rivalry" for the offices, and not even a mixed possession; yet the court would have had ample *jurisdiction* to have entertained the application even had the office of county commissioner been in controversy—even had there been an adverse or mixed possession. Whether or not the exercise of such jurisdiction should be declined in a given case is a question within the sound discretion of the court, subject to direct review in error but not to a collateral attack.

This proposition is sufficiently demonstrated by Mr. Justice FREEMAN in his able opinion, whose arguments and citations are perfectly conclusive. (*Trans.*, fols. 33 to 37, both inclusive.)

To the authorities cited by him I add the following:

Putnam v. *Langley*, 133 Mass., 204.

State v. *Mayor, &c., of Atlantic City* (S. C. New Jersey, March 12, 1890), 19 Atlantic Rep., 780.

The New Jersey case cited shows that it would have been within the jurisdiction of the district court, even if Creamer and Martinez had assumed to enter upon the offices of county commissioners, to ~~have~~ inquire by mandamus into the legality, and especially the *honesty*, of their pretensions, and in the course of that inquiry to consult its own records adjudicating any matters involved in the ascertainment of the true title. Enough is disclosed in the record here to show that the same district court had been previously called upon to render judicial aid in averting threatened election frauds and vindicating the will of the electors, and that there remained in its own archives relevant evidence of which it could take judicial notice.

See also *In re* Sloan, 25 Pac. Rep., 930.

The supreme court of New Jersey says (19 Atl. Rep., page 782), with reference to the general rule, that *quo warranto* is to be preferred to *mandamus* in determining official titles:

"That rule, in its rigidity, is applicable to cases only in which a relator, *clearly out* of office *de facto*, is seeking to oust an incumbent who is *clearly in*. In such cases the reason for the rule makes the fullness of the office *de facto* the test as to whether *quo warranto* is or is not the only remedy. There is, however, a class of cases in which this reason for the rule is wanting. I refer to those cases in which the facts before the court or *within its judicial knowledge* show that the relator was in office *de jure et de facto*, and that the defendant, while claiming to be in *de facto*, can make no claim to be in *de jure*. Here the relator is not called upon to test the title to the office, for that is not in dispute. The office is not *de facto* full against him, unless by his conduct he *elects to consider himself out*. In contemplation of law, his title to the office *de jure* draws to it the possession *de facto*, as in cases where *simultaneous acts of occupancy* are exercised by contest-

ants over a legal title. In such cases there is nothing to be tried by *quo warranto*."

It may well be said that the various remedial forms which the common law of judicature sanctions are largely the growth of judicial rules of practice, mere creations of a conceded jurisdiction, and subject to modification by course of judicial decision, and therefore part of discretionary judicial jurisdiction.

The judicial debates upon the selection of appropriate forms of procedure for granting relief in special cases, upon what might be termed the *marshaling of remedies*, are debates within the limits of jurisdiction upon subjects lawfully submitted to sound judicial discretion; and, therefore, we can understand how, within the limits of jurisdiction, courts may vary in their disposition to extend or restrict the office of any particular common-law writ. Hence the great conflict in the precedents, both in this country and in England, upon the question whether, in a given state of facts, jurisdiction by mandamus should be entertained or declined is perfectly reconcilable with the theory that in all the precedents *pro* and *con.* the courts had jurisdiction, although they had diversity of opinion as to the propriety of its exercise.

While some courts restrict the use of mandamus greatly more than the earliest English precedents; "on the contrary, other State courts, notably those of Massachusetts, have relaxed the rigidity of the rule, and to a certain extent permit the right to an office actually filled to be raised upon an alternative mandamus."

Ib., 19 Atl. Rep., page 781.

But the rigid "rule" referred to—in itself a rule merely of *practice* and not of *jurisdiction*—would have permitted the rival claimants to the commissionerships (if, indeed, any such competitors can be assumed to exist upon the reading

of the record) to settle their controversy by *mandamus*, for Lord MANSFIELD, in *Rex* v. *Bankes*, 3 Burrows, 1452, called for affidavits concerning the facts attending an election, under which an actual incumbent claimed to occupy an office and resisted a mandamus to oust him, to enable the court to determine whether the election was "doubtful" or merely "colorable," saying that in the former case the court might not grant a mandamus, while in the latter case the court ought to do so.

SHORTT, in stating the present rule in England, says (*Heard's* Shortt's Informations, &c., page 122):

"Whenever the office is full, *de facto*, the proper method of proceeding is by *quo warranto* to oust the occupant if he is not in possession *de jure;* and the office is full, *de facto*, though the election to it was illegal, provided it was a real and not merely a colorable election. If, on the other hand, the election was merely *colorable*, so as to be really no election at all, it does not confer even a *de facto* possession, and the remedy of the person ousted by it is not *quo warranto*, but *mandamus*."

So, were this a controversy duly litigated between the county commissioners, who are the relators here, and others, pretenders to the same offices, this Court might well intend that a judgment pronounced in favor of the relators was the result of a judicial determination that the pretensions set up by the other claimants were "colorable" merely.

But such a subject is only an imaginary factor in this discussion, for the *mandamus* concerned only a clerk and his duties to his official masters, and the appropriateness of the form of remedy was a question within the competency of the district court.

Strong's Case, 20 Pick., 484, 495.

In the case (previously cited) of *Rex* v. *Harris* (3 Burr 1420) the defendant, Dr. Harris, commissary of the Bishop of Winchester's court, was defendant in a mandamus sued

out by Henry Griffith and Thomas Garner, commanding him to swear and admit them to the office of church wardens, to which they claimed to have been elected. At the same time a cross-mandamus was pending against him, sued out by David Griffin and three others, directing him to swear and admit them to the *same* office. In his return he set up the pendency of the two writs and their consolidation into one, the dispute among the parties as to which of them had been elected, and which dispute was on trial before him, &c., &c.

Lord MANSFIELD said (*ib.*, page 1422):

"It is an indecent return. He has no right to try the question. He cannot try the legality of the votes. The king's writ commands him to admit and swear, and he must obey it."

The defendant's counsel then protested:

"Here are two cross-mandamuses, and the doctor does not know which to obey."

Whereupon both Lord MANSFIELD and Mr. Justice WILMOT ruled:

"He ought to obey both. It is *without prejudice to the right of either claimant.*"

Mandamus at common law was part of a discretionary jurisdiction of the KING'S Bench, without any defined limits.

Mr. Justice POWYS said, in Heathcote's case (10 Mod., at page 58):

"All cases of mandamus are granted *hæsitante curiâ.*"

But the liberty to doubt in such cases is only the measure of the liberty to adjudicate.

However, the appellant was in no position to raise this question pertaining to the election of remedies, for it was foreign to his case. *As between himself and the relators* no *quo warranto* could possibly lie; the commissioners could co-

erce forensically his performance of official duty by mandamus, or not at all.

Williams v. *Clayton*, 21 Pac. Rep., 398.

To add a quotation made by Chief Justice GRAY, in *Attorney General* v. *Boston*, 123 Mass., at page 471:

"'The reason why we grant these writs,'" said Lord HARDWICKE, when presiding in the King's Bench, "'is to prevent a failure of justice and for the execution of the common law or of some statute or of the king's charter.'"

The King v. *Wheeler*, Cas. Temp. Hardw., 99.

2. The second objection is in legal effect simply a repetition of the first. It denies jurisdiction of the "judge of the district" over the subject-matter or the remedy. The proceedings were not before the "judge," but before the court, which was kept "open at all times" for the purpose, by force of the statute (*Comp. Laws*, §§ 1829, 2005, *supra*), and they were expressly authorized both by the statute (*ib.*, § 1993, *supra*) and the common law.

3. The third objection is wholly based on the pretension that the "answer" of the defendant below showed that Creamer and Martinez were in possession of the offices of county commissioners, and that "the said judge" had no jurisdiction to compel the defendant to recognize the relators pending such *de facto* occupation.

This objection also involves the same considerations as the first objection (*supra*), but it does not go to the *jurisdiction* of the court. The answer did not import absolute verity any more than did the petition. Both were verified, but the defendant's verification to the answer (*Trans.*, page 15) is very informal and evasive, being "that the *facts* set forth in the foregoing answer are true, to his best knowledge, information, and belief." A comparison of this answer with the petition and alternative writ (*ib.*, fols. 1 *et seq.*) will clearly show that it evades many of the allegations of

the latter; that it is vague, indefinite, argumentative, and inconsistent; that it denies matter of law instead of matter of fact, and that it avers conclusions of law instead of simple facts. Treated as a pleading, it was open to demurrer as to both form and substance.

Upon the petition, writ, and answer the court had full jurisdiction to pass upon the sufficiency of the latter, and any error committed in its exercise of such jurisdiction could not be available to the defendant collaterally. (*Comp. Laws*, § 1999.)

The statute of mandamus authorizes by implication the verification of the petition, but not of the answer; so that no weight is added to the latter by the irregular verification.

The petition recited another mandamus proceeding remaining of record in the same court, wherein Benjamin M. Read was relator, and it incorporated with itself by express reference and declaration (*ib.*, fol. 5) "all the papers, records, and proceedings had and now remaining in this court in the said matter of mandamus wherein the said Benjamin M. Read was relator as aforesaid," and also "the several certificates of election aforesaid, whereof copies are herewith filed."

The district judge, "having read and considered the said application" (*ib.*, fol. 6), which, of course, included the consideration of the records remaining in his own court in the mandamus matter of Benjamin M. Read, duly ordered the alternative writ and made it returnable before the *district court* (*ib.*, page 12), that court being "open at all times" for the purpose (*Comp. Laws*, §§ 1829, 2005). The record does not present the proceedings in the recited matter of Benjamin M. Read or any other evidence, for no bill of exceptions was made or tendered in the district court.

Nor has this Court before it any history of the trial below or any means of ascertaining the "movements" of the district court after the return of the alternative writ up to the promulgation of its judgment, nor has this Court, nor had the

supreme court below, any concern in this collateral proceeding with such subjects, all of which pertain to the regular conduct of the litigation. The district court had the right to entertain the petition for mandamus. The only remaining question arises on its judgment. Upon the coming in of the answer the matter duly came to a hearing with the acquiescence and presence of all the parties. (*Ib.*, fol. 14.)

No question was raised as to time, place, or mode of hearing; and, whatever the mode of trial adopted, all parties concurred (*ib.*, fol. 14). The record discloses the facts of appearance of parties, their arguments, the hearing by the court, the motion for a peremptory writ, the submission to the court, its advisement, and its judgment. If anything more were necessary to jurisdiction its existence would be conclusively presumed. *Non constat* but that the court took proofs. It certainly took judicial notice of its own records, which were made part of the petition. It was better advised of the merits than either this Court or the territorial supreme court could be from the imperfect chronicle afforded by the incomplete record. It certainly is gratuitous to assume, as does the chief justice in his opinion (*ib.*, fol. 46), that the district court on the hearing was not advised of any facts of evidential importance not apparent on the partial record as afterwards made on the appellant's application. Every presumption must go in support of the jurisdiction assumed.

4. The fourth objection is that—

"The said judge of said district court, during vacation and when said court was not in session, had no power, authority, or jurisdiction to hear and try an application for a peremptory writ of mandamus and to order the issuing of said writ."

This is a repetition of the pretense that the hearing pro-

ceeded before a judge out of court and not in the court itself.

In truth, the whole case was duly conducted in open court, the statute keeping the court always open in such cases.

See Compiled Laws, §§ 1824, 2005.

This matter of practice is made plain by these statutory provisions, and is settled by the adjudications of the supreme court of the Territory.

In re Sloan, 25 Pac. Rep., 930.

Territory v. *Bernalillo Co.*, 16 Pac. Rep., 855.

The rule of this Court was indicated by MILLER, J., in *Sweeney* v. *Lomme*, 22 Wall., at page 213, who said:

"Without expressing any opinion of our own on the question, we hold that, as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the supreme court of Montana in the consideration of it."

"The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies and to the *regulations which might be adopted by the courts themselves.*"

Per BRADLEY, J., in *Hornbuckle* v. *Toombs*, 18 Wall., 648, 657.

5. The fifth objection is that "the said judge of said district court had no power, authority, or jurisdiction" to commit the appellant "in vacation" for his disobedience.

This objection is based on precedents found in Kansas and other States denying to judges or magistrates acting out of court the power to punish for contempt.

But it misstates the facts and the law, since the district judge did not assume to act out of court, but, knowing that his court was "open at all times" by statutory com-

mand, he simply presided as its judicial minister, and all that was done in the matter of the mandamus and in that of the contempt was done by the open court pursuant to its absolute jurisdiction.

The same open court which delivered the judgment in mandamus continued as a court for the purposes of its enforcement, and will yet continue until the conclusion of the case by satisfaction of its mandate.

This "open court" was not a "thing of shreds and patches," of uncertain and spotted jurisdiction, but it was a continuous judicial authority, with an energy adequate at all times to enforce and vindicate its judgments.

The precedents cited as to the limitations ordinarily affecting the power of judges "out of court" have no applicability to the action of the court itself; and, although some of these precedents arose in States which have adopted a practice in mandamus generally akin to that found in New Mexico, the analogy does not exist in respect of the courts and their authority outside of stated terms.

6. The sixth and last objection is that under the mandamus statute "the only punishment that can be assessed for a refusal to comply with the commands of such a writ is a fine not exceeding $250, as specified by section 2002 of the Compiled Laws of 1884."

Although the Kansas supreme court in a case reported in the 19th Pacific Reporter seems to adopt this remarkable view of the statutory phraseology cited in this section (of which the equivalent is found in that State), it is evident that what was so said was *obiter* merely, and was a most improvident utterance.

That phraseology originated with the New York revisers, and its intention was not only clearly expressed by them, but also by the New York court of appeals in People *ex rel.*

Garbutt *v.* R. & S. L. R. R. Co., 70 N. Y., 294, 299, and the plain reading of the words accords with that intention.

New Mexico derived from New York the statutory provisions found in § 2002 of the compiled laws.

That section was copied almost bodily from the Revised Statutes of New York. (2 N. Y. R. S., 587, § 60.)

In the case in 70th New York it appeared that the supreme court, at special term, as a *punishment* for contempt committed by disobeying a writ of mandamus, fined the defendants $507.02, "of which sum $98.35 was for the costs and expenses in the mandamus proceedings and $100 for fees paid by the relator to his attorneys in these proceedings, which the court held to be a fair compensation for their services. The general term modified the order by deducting the said sum of $98.35, and as modified affirmed it."

The court of appeals in affirming the judgment said (*ib.*, page 298, &c.):

"It is further contended that the penalty prescribed by 2 R. S., 587, sec. 60, is the only penalty which can be imposed in a case like the present. That section declares that 'whenever a peremptory mandamus shall be directed to any public officer, body, or board commanding them to perform any public duty specially enjoined upon them by any provision of law, if it shall appear to the court that such officer or any member of such body or board has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding $250 upon every such officer or member of such body or board; and such fine, when collected, shall be paid into the Treasury; and the payment of such fine shall be a bar to any action for any penalty incurred by such officer or member of said body or board by reason of his refusal or neglect to perform the duty so enjoined.'

"We do not think that this provision was intended to prescribe the punishment for disobeying the writ, but that its object was to authorize the court, to whom application should be made for a writ of mandamus against a public officer, body, or board, to compel the performance of a public duty specially enjoined by law, to impose a fine upon the

officer, etc., for *past* neglect of the duty, in addition to awarding a peremptory mandamus compelling its performance, providing no just excuse is shown for such past neglect. This power of the court granting the mandamus to fine for past neglect was intended to obviate the necessity of a criminal prosecution under the statute which constitutes such neglect a misdemeanor, and to enable the court awarding the mandamus to dispose of the whole matter in one proceeding. The offence for which the fine is authorized to be imposed is not disobedience of the writ, but the unexcused neglect of duty of which the officer was guilty before the writ issued and which rendered the application necessary, and the fine may be imposed at the time of issuing the peremptory writ.

"This is the clear import of the language of the section, and in the reviser's notes it is stated to be a new provision, intended for the purpose above indicated."

Thus it appears that the powers of the court, instead of being abridged, were enlarged by the section in question, and that the court retains its old and inherent power to punish a contempt in a mandamus case by fine and imprisonment at discretion (unless certain restrictive acts of Congress can be held applicable, although intended for the Federal courts exercising jurisdiction in the several States), and, at the same time and concurrently, its old and inherent power to compel obedience to its mandates by means of the coercive measure of imprisonment.

NINTH POINT.

The Command of the Writ Did Not Exceed the Jurisdiction of the Court.

Although only the six grounds of objection discussed in the eighth point were made formally in the court below, I concede that upon the argument it was suggested, in behalf of the appellant, that the command of the writ of mandamus

embraced too much—a suggestion which is referred to and fully covered by the court in its opinion. (*Trans.*, fols. 36, 37.)

The case disclosed a willful *total rejection* by the probate clerk *of his ex officio functions* as clerk of the board of county commissioners, and it was the proper office of the writ to point out to him his duty in respect of the *whole body* of such functions and to command performance of that duty. In brief, he was judicially told you are the lawful clerk of the relators; it is your duty to acknowledge that relation to them and render them all due clerical service; you are therefore commanded to discharge that duty. Merely specifying in the writ certain urgent forms of that duty does not militate against this proposition. The specification was in the interest of the defendant. The duty concerned the past, present, and future. It involved a continuing official obedience to his official superiors.

On this subject I have nothing more to add to what was said by Chief Judge CHURCH in the case cited by the supreme court of New Mexico, in its opinion (*People* v. *Nostrand*, 46 N. Y., 378), except the more cogent remarks on the same subject made by Mr. Justice GRAY when he presided over the supreme judicial court of Massachusetts. (See *Attorney General* v. *Boston*, 123 Mass., 460.)

The Chief Justice said (*ib.*, page 472 *et seq.*):

"It is said in Tapping on Mandamus, 10, cited for the respondent, that 'a mandamus will not be granted in anticipation of a defect of duty or error of conduct.' But the only reference of the learned author in support of this proposition is to *Blackborough* v. *Davis*, 1 P. Wms., 48, and an examination of that case shows that the passage referred to was but a remark of counsel, not assented to or acted upon by the court. * * * The passage cited for the respondent from High on Extraordinary Remedies, § 12, substantially accords with the statement of Tapping above quoted. But the only cases there referred to are from Maryland, Kansas, and Louisiana, and differ so widely from the case before us that we need not consider whether they were well decided.

"In the cases in Maryland and in Kansas, the only day when the respondents could by law act upon the subject in question had either passed or had not arrived when the writ of mandamus was applied for. (*Commissioners of Schools* v. *County Commissioners*, 20 Md., 449; *State* v. *State Canvassers*, 3 Kansas, 88.)

"The cases in Louisiana were attempts by a creditor of a municipal corporation or of the State to secure priority by writ of attachment to its treasurer to pay the debt of the petitioner, and the writ was refused, in the one case, because it appeared by the record that the proceedings were fictitious and collusive, and, in the other, because the treasurer had not received the money and could not therefore be in fault for not paying it. (*State* v. *Burbank*, 22 La. Ann., 298; *State* v. *Dubluclet*, 24 La. Ann., 16.)

"Application for writs of mandamus being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of mandamus shall be granted; and the court will not grant the writ unless satisfied that it is necessary to do so in order to secure the execution of the laws. But when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ." [Then follows a very instructive analysis of numerous corroborative precedents, one of which was in the same court—*Farnsworth* v. *Boston*, 121 Mass., 173.]

"As a general rule, indeed, there must have been an express demand of that which the party moving for the writ desires to enforce (Tapping on Mandamus, 283, 284; *United States* v. *Montwell*, 17 Wall., 604, 607); but where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty clearly required of it by law, no demand is necessary before applying for the writ;" citing *Commonwealth* v. *Commissioners of Allegheny*, 37 Penn. St., 237; *State* v. *Common Council of Rahway*, 4 Vroom, 110.

See also *People* v. *Jacobs*, 66 N. Y., 8 (distinguishing the Tweed case, 60 N. Y., 559).

TENTH POINT.

As to the Right of Trial by Jury.

Noticing that the appellant in his petition for the advancement of this cause upon the docket represents that by the action of the trial court he was deprived of the right of trial by jury, I feel called upon to say:

1st. No such objection appears in the record.

2d. No such objection was, I believe, presented, discussed, or considered below.

3d. And if the objection were properly in the case it would be unavailable: 1st, because trial by jury was waived by legal intendment, even if it was appropriate; 2d, because the statute did not contemplate trial by jury, except as a matter of discretion with the court; 3d, because the nature of the proceeding,—a summary proceeding out of term, before a court open only by virtue of a statute and unattended by a jury, a proceeding in which the court could grant a peremptory writ even in the first instance (Comp. Laws, § 1996),—was inconsistent with any *right* to trial by jury (*Territory* v. *Bernalillo Co.*, 16 Pac., 855); and, lastly, because, even in an ordinary suit at law, denial of the right of trial by jury is simply an error of procedure in no sense jurisdictional.

And 4th. If, as alleged by the appellant, the court held the answer to be insufficient, the ruling proceeded on a question of law only.

ELEVENTH POINT.

This Court Has No Jurisdiction to Entertain this Appeal, because the Decision Below was not "upon any Writ of Habeas Corpus Involving the Question of Personal Freedom."—(9 St., page 446, § 10.)

Except in "cases affecting ambassadors, public ministers, and consuls, and those in which a State shall be a party," it is settled that this Court has no original jurisdiction to issue the writ of *habeas corpus* (Const., art. 3, § 2). In matters of *habeas corpus* not within that exception it can act only under its appellate powers.

Ex parte Bollman, 4 Cranch, 75, 103.
Ex parte Hung Hang, 108 U. S., 552.

That appellate jurisdiction being subject to such exceptions and regulations as Congress shall make (Const., *supra*), this Court has often been required to consult acts of Congress to ascertain the restrictions imposed upon it by such legislation, and early in its history it determined that its appellate powers "are subjected to the will of the legislature of the Union, and it can exercise appellate jurisdiction in no case unless expressly authorized to do so by the laws of Congress."

Chief Justice MARSHALL in *Ex parte* Bollman, 4 Cranch, at page 103.

And in construing the statutes providing the cases in which it is authorized to exercise appellate jurisdiction the Court uniformly applies the maxim *expressio unius est exclusio alterius.*

Farnsworth v. *Montana*, 129 U. S., 104.

Hence it follows that the jurisdiction of the Court over writs of *habeas corpus* issued by any territorial court must

be deemed limited by those acts of Congress which declare affirmatively in what cases such jurisdiction shall or may be exercised.

The organic act of New Mexico (September 9, 1850, 9 St., page 446) declares (§ 10) as to the territorial courts thereby created that "the said supreme and district courts of the said Territory and the respective judges thereof shall and may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the United States in the District of Columbia." The same provision is found in the organic act of Utah (9 St., page 457, § 9) and in § 1909 of the U. S. Revised Statutes in the codification of various territorial organic acts. Not a word is said in the organic act of New Mexico or in § 1909 of the U. S. Revised Statutes as to any authority in this Court to review the decision of a territorial court in *general* cases of *habeas corpus*.

The only expressions in that organic act which relate to the power of the Court in the premises are the following (9 St., page 447, § 10; U. S. R. S., § 1909):

"Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, when the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party or other competent witness, shall exceed one thousand dollars [now raised to $5,000 by act of 1885, 23 St., page 443], *except only* that in all cases involving *title to slaves* the said writs of error or appeals shall be allowed and decided by the said supreme court *without regard to the value* of the matter, property, or title in controversy, and *except also* that a writ of error or appeal shall also be allowed to the Supreme Court of the United States from the decision of the said supreme court created by this act or of any judge thereof or of the district courts created by this act or of any judge thereof upon any writ of *habeas corpus involving the question of personal freedom*."

The Court has several times decided that these statutory words as found in the organic act of New Mexico and those of some other Territories and codified as § 1909 of the U. S. Revised Statutes express the measure and the limits of its appellate power over the decisions of the territorial courts to which they relate.

U. S. v. *R. R. Co.*, 105 U. S., 263.
Potts v. *Chumasero*, 92 U. S., 358.
Kurtz v. *Moffitt*, 115 U. S., 487.

In the case last cited (115 U. S., at page 498) the Court said, by Mr. Justice GRAY, that the clause "upon writ of ~~error~~ habeas corpus involving the question of personal freedom," above cited, "*clearly implies that writs of habeas corpus would not be included* [in the appellate power of the court] *if not specially mentioned.*"

It is only because of the exceptive implication of the statute that the Court refuses to entertain writs of error in criminal cases from New Mexico or other Territories in like predicament, and that although by inadvertence it did assume ungranted criminal jurisdiction in a Utah case (*Cannon* v. *U. S.*, 116 U. S., 55), yet afterwards, when its attention had been called to its lack of jurisdiction, it promptly recalled its mandate and dismissed the writ of error "for want of jurisdiction," saying that "the question was overlooked by all the members of the Court." (See *Snow* v. *U. S.*, 118 U. S., at page 354.)

It therefore also follows that the Court has no jurisdiction to entertain the present appeal, unless the decision of the supreme court of New Mexico here complained of was upon a writ of *habeas corpus* "*involving the question of personal freedom.*"

I submit that the writ under consideration does not involve "the *question* of *personal freedom.*" I submit this with diffidence, however, because the Court has already assumed

the contrary, although, I believe, inadvertently and without any discussion by counsel or other aiding suggestion.

After Snow's writ of error had been dismissed "for want of jurisdiction" (118 U. S., at page 355) he (being imprisoned on conviction for unlawful cohabitation) applied to a district court of Utah for a writ of *habeas corpus*, which application was refused. Thereupon he appealed directly to this Court from the order refusing him relief, and evidently he took this appeal upon the assumption that his case came within the clause of the organic act of Utah (9 St., § 9, page 455; § 1909, U. S. Revised Statutes), which is a copy of the clause now in question.

Upon the appeal the Court discharged him.

(See *In re Snow*, 120 U. S., 274.)

It appears that counsel for the United States made only two points—first, that an appeal would not lie from an order *refusing to issue* the writ of *habeas corpus;* and, secondly, that the court below had jurisdiction to pass the sentence under which the appellant was confined. The Court (as in the Cannon case), overlooking a defect of jurisdiction which had not been assigned as error or otherwise suggested by counsel, passed advisedly on the only two points discussed, saying, as to the first (*ib.*, page 280):

> "There can be no doubt that the action of the district court as set forth in its order and judgment refusing to issue the writ was, so far as an appeal is concerned, equivalent to a refusal to discharge the petitioner on a hearing on the return to a writ, and that under § 1909 of the Revised Statutes an appeal lies to this Court from that order and judgment."

The same assumption (without argument or special attention to the point) occurs in a few other cases:

Ex parte Crow Dog, 109 U. S., 556; *Gon-Shay-ee's case*, 130 U. S., 343; *Captain Jack's case*, *ib.*, 353, and *Hans Nielson's case*, 131 U. S., 177.

I contend that the provision for writs of error and ap-

peals in cases of *habeas corpus* "involving the question of personal freedom" was intended to have a specific and not a general application; that it was not introduced for the relief of all persons unlawfully restrained of their liberty, to whom the common law writ of *habeas corpus ad subjiciendum* might be available, but only for the relief of persons interested in the *status* of one held in bondage as a *slave*, and that the provision is clearly *in pari materia* with the next preceding clause, which guarantees the right of review by this Court "in all cases involving *title to slaves*" without regard to any merely pecuniary conditions.

A moment's consideration of the phraseology of the clause ought to convince any one that it relates to a *species* of *habeas corpus* and not to the whole *genus*. The "writ of *habeas corpus*" is as familiar as a household word. We all understand what it means as used in the forms framed to enforce the rights guaranteed by Magna Charta as well as in American Constitutions and English and American statutes and in judicial decisions rendered times innumerable during several centuries. It means a writ for the production of the body of one alleged to be unlawfully restrained of his liberty in order that the legality of the restraint may be judicially investigated. *Ex vi termini*, it imports that the liberty of a human being has been interfered with. It would be tautological and very crude to adopt the phrase "writ of *habeas corpus involving the question of personal freedom*" if the descriptive words were employed merely to express what is necessarily implied in the very nature of the writ itself. The same organic act, in its grant of power to the territorial courts to issue writs of *habeas corpus* (9 St., § 10, page 446; U. S. R. S., § 1909), contains no such definitive or qualifying words. "Writs of *habeas corpus*" are there referred to as familiar things, well understood, just as the writ of *habeas corpus* is referred to in the Constitution (art. 1, § 8) and in the several *habeas corpus* statutes enacted by Congress.

This familiar fact is pointedly noticed by Chief Justice

the contrary, although, I believe, inadvertently and without any discussion by counsel or other aiding suggestion.

After Snow's writ of error had been dismissed "for want of jurisdiction" (118 U. S., at page 355) he (being imprisoned on conviction for unlawful cohabitation) applied to a district court of Utah for a writ of *habeas corpus*, which application was refused. Thereupon he appealed directly to this Court from the order refusing him relief, and evidently he took this appeal upon the assumption that his case came within the clause of the organic act of Utah (9 St., § 9, page 455; § 1909, U. S. Revised Statutes), which is a copy of the clause now in question.

Upon the appeal the Court discharged him.

(See *In re Snow*, 120 U. S., 274.)

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MARSHALL, who says (*Ex parte* Bollman, 4 Cranch, at page 95):

"It has been truly said that this is a generic term and includes every species of that writ. To this it may be added that, when used singly, when we say the writ of *habeas corpus* without addition, we most generally mean that great writ which is now applied for, and in that sense it is used in the Constitution."

The purpose of the organic act was evidently to discriminate in favor of writs of *habeas corpus* issued to test "the question of personal freedom," to solve judicially the vital question of personal status, "*slave* or *freeman?*"

This species of the writ involved, not simply the restraint or interference with liberty which is found in every case of *habeas corpus;* not simply the question whether one was unlawfully restrained or not by a particular person, in a particular place, at a particular time, but the special and more far-reaching question whether the victim of the admitted restraint was a freeman or a human chattel. "The question of personal freedom" was, then, only a question of personal *status.*

The solicitude of the statute to provide for a review in this Court of every case in which, by regular course of suit, at law or in equity, the title to slaves should be determined by the supreme court of the Territory went hand in hand with a solicitude equally strong to provide for a like review whenever, in the only other judicial proceeding relevant, "the question of personal freedom" should be presented upon return to a writ of *habeas corpus* by a claim on the one hand that the detained person was a slave, and on the other that he was a freeman.

The word "freedom" is used in the statute antithetically to the word "slavery" understood. It was a word constantly so employed in current speech during the days of slavery.

And so in *Respublica* v. *Betsey*, 1 Dallas, at page 470, with

reference to certain statutory words considered by the court, it said :

"The words 'free men and free women' seem to have been used in opposition to the word 'slaves' or 'servants for life,' or 'until the age of thirty-one years,' and not to mean that they shall be absolutely free from every species of servitude."

That was a case of *habeas corpus*.

Wood v. *Davis*, 7 Cranch, 271, presents "the question of personal freedom," for "the issue was joined upon the *question* whether the petitioners were entitled to their *freedom*." It was a slave case.

Vigel v. *Naylor*, 24 How., 208, came to this Court on error from the District of Columbia. It was "a petition for freedom." In its opinion the Court referred to "the status of freedom" as involved (*ib.*, page 212). It says also (*ib.*, page 214):

"In some of the States the suit may be in equity and the status of freedom be established by a decree."

The "question of personal freedom" also arose in *Henry* v. *Ball*, 1 Wheaton, 1, and *Davis* v. *Wood*, 1 Wheaton, 6.

So in *Choteau* v. *Marguerite*, 12 Pet., 507, "the question was whether the appellee was a slave."

Before the civil war the courts of the South were full of cases in various forms of action involving "the question of freedom" (or slavery). The "petition for freedom" was a familiar form of remedy in Maryland and the District of Columbia.

See *Lee* v. *Lee*, 8 Pet., 44.

"The matter in dispute in this case is the freedom of the petitioners."

Ib., syllabus.

That was "the question of personal freedom."

Familiarity with that question, acquired in his long practice in the Maryland courts, must have led Reverdy Johnson, the author of the clause adopted in the organic act, to employ it as peculiarly and emphatically expressive of what every member of Congress who voted for it intended. (*Vide infra.*)

The term "personal freedom" is very appropriate in its relation to a personal *status*. That or its antithetical correlative, "personal slavery," is very frequently employed in legal and political literature, and especially in reports of cases relating to slaves.

"Presumption—*personal freedom.*—All persons in this State are deemed to be free."

Syllabus to the slave case of *Willard* v. *The People*, 4 Scammon, at page 462.

"An Indian, negro, mulatto, or mustizo held as a slave and claiming to be free cannot resort to the writ *de homine replegiando* to try *the question of freedom.*"

Syllabus to *Hager* v. *Barnwell*, 5 Rich. S. C., 273 (May term, 1851).

"As between master and slave, *the question of freedom* can only be tried in the manner prescribed by the statute; but when negroes are levied on by the sheriff as the property of the defendant in execution they may try *the question of their freedom* as between him and them by petition for *habeas corpus.*"

Union Bank of Tennessee v. *Benham*, 23 Ala., 143.

"White persons held as slaves can try their *right to freedom* on *habeas corpus.*"

Guilford v. *Hicks*, 36 Ala., 95.

"The writ of *habeas corpus* is not the proper method of trying the *right of a negro to freedom.*"

Clark v. *Gautier*, 8 Fla., 360.
Renny v. *Mayfield*, 4 Hayes, 165.

"The judgment upon a writ of *habeas corpus* does not determine *the question* of the *claim* of the prisoner to *freedom.*" (A slave case.)

In re Perkins, 2 Cal., 424.

There are scores of slave cases digested by Abbott in his 12th vol. of U. S. Digest (1st series), title "Slaves," in each of which "freedom" was considered as a personal status opposed to "slavery," and which involved "the question of personal freedom," intended by the organic act.

In some of the dictionaries "freedom" and "liberty" are compared as to their signification to show that "*freedom*" is better applied to a personal *status* than "liberty."

Webster's primary definition of "slavery" is:

"Bondage; the *state* of entire subjection of one person to the will of another."

Antithetically his primary definition of "freedom" is:

"A *state* of exemption from the power or control of another; liberty; exemption from slavery, servitude, or confinement. Freedom is *personal*, civil, political, and religious."

Sometimes the "question of personal freedom" has been raised under a writ of *habeas corpus* sued out by a master for a slave unlawfully restrained by a third person in order to show the illegality of such restraint. In such cases the very status as a slave has been the reason and argument for recovering the body of a slave from illegal restraint.

As said by LEWIS, chief justice, in *Ex parte* Williamson, cited by Hurd (*Habeas Corpus*, page 556) from 3 Am. Law Reg., 741:

"It is true that the *habeas corpus* act was not intended to decide rights of property, but the writ at common law may be issued to deliver an infant to a parent or an apprentice to a master. On the same principle I see no reason why the writ at common law may not be used to deliver a slave from illegal restraint and restore him to the custody of his master."

The genesis of the statutory provisions looking to a review by this Court of questions having their origin in the institution of slavery confirms this theory of construction.

The territorial organic acts passed prior to that of New Mexico did not contain a word importing an intention to put upon this Court the burden of reviewing decisions by territorial courts or magistrates upon writs of *habeas corpus*; but in 1850, when the settlement of the boundary between Texas and New Mexico was debated in Congress in connection with the proposed establishment of a territorial government in New Mexico, the whole country was deeply agitated by the question of slavery, and this question assumed many forms. The South insisted upon the constitutional right of the slaveholder to reside in the Territories and take with him his slaves; many of the North insisted upon the constitutional right of Congress to restrict and even abolish slavery in the Territories, while the followers of Foote and Douglas advocated the right of the inhabitants of the Territories to determine such questions for themselves. Compromises proved merely temporary expedients, for that political fever had already broken out which finally consumed itself in the great civil war. The debates in Congress, and especially in the Senate, show the political sensitiveness of the day on all subjects pertaining to the institution of slavery; so when an organic act was proposed in the Senate for New Mexico it became the subject of elaborate and protracted discussion relative to its bearing upon that institution. Mr. Hale, of New Hampshire, was the first to suggest as a graft upon the old stock of territorial organic act (of which that of Wisconsin is typical; see *Clinton* v. *Englebrecht*, 13 Wall., at page 444) the introduction of the clauses providing for a review by this Court of all cases involving the title to slaves and "involving the question of personal freedom."

This was the first time in the history of congressional legislation that such a provision was embodied in a territorial organic act, although subsequently the precedent was followed in some instances, as in Utah (9 St., 453, § 9), Nebraska, and Kansas (10 St., 277, § 7). In the organic acts of Colorado (February 28, 1861, 12 St., 172, 700), Nevada

(March 2, 1861, 12 St., 209), Dakota (March 2, 1861, 12 St., 239), and Wyoming (July 25, 1868, 15 St., 178), these clauses as to cases involving the title to slaves and writs of *habeas corpus* "involving the question of personal freedom" are wholly omitted. In those of Idaho (March 3, 1863, 12 St., 808) and Montana (March 26, 1864, 13 St., 85) the *habeas corpus* clause is retained; but as to Arizona, which was in the same political category with New Mexico, and where that form of bondage known as "peonage" was to be apprehended, the organic act of New Mexico was apparently extended (February 24, 1863, 12 St., 664), and the following precautionary clause was enacted (*ib.*, § 3):

"That there shall neither be slavery nor involuntary servitude in the said Territory otherwise than in the punishment of crime, whereof the parties shall have been duly convicted; and all acts and parts of acts, either of Congress or of the Territory of New Mexico, establishing, regulating, or in any way recognizing the relation of master and slave in said Territory are hereby repealed."

The institution of "peonage," which certainly presented a personal status, as to which a *habeas corpus* "involving the question of personal freedom" might frequently be appropriate, was not expressly abolished by act of Congress until March 2, 1867. (U. S. Revised Statutes, §§ 1990, 5526.)

Political changes in our history rendered the clauses in question at first obsolescent and finally obsolete, unless it be with reference to enforced restraint under claim of apprenticeship, minority, &c, and such questions as might yet be litigated respecting the "personal freedom" of bondmen brought hither from foreign countries.

Naturally the retention in the Revised Statutes (§ 1909) of the clause respecting *habeas corpus* after the enfeebling of its *raison d'être* has easily misled both bench and bar in their first impression of its meaning.

It is impossible to read the debate which ensued in the Senate upon Mr. Hale's amendment without becoming con-

vinced that the provision was intended to mean what I claim it to mean, and nothing further. (See *Appendix to Congressional Globe*, 1st sess., 31st Cong., vol. 22, part 2, page 897, *et seq.*)

The clauses in question first occur in the "Clayton compromise bill," and Mr. Hale copied them from that bill. They originated with Reverdy Johnson. (See *Journal of Congress* of July 26, 1848, and Appendix, *supra*, vol. 22, part 2, page 899.) Mr. Butler's remarks (Appendix, *supra*, page 900) show that that compromise concerned only the question of slavery. Those of Mr. Hamlin, on the same page, show that the words "personal freedom" were intended to mean the status of freedom. So do those of Mr. Underwood, who followed him in debate. He spoke from the Southern standpoint, and objected to the *habeas corpus* clause as unnecessary and inexpedient. He described the loose judicial proceedings which he fancied would result, saying (*ib.*, page 900):

"The judge issues his writ commanding A to bring him the body of B, and to certify the cause of his detention in custody. That is the nature of the writ of *habeas corpus*. When A is thus summoned to bring the body of B to appear before the judge, and when he returns his answer to the summons, it is: I claim B and the right to keep him in custody as my slave. What follows? Then this judge, without a jury, without a clerk, without any of the appendages of a court of justice, is to decide *the question of freedom or slavery*, and to make up something to bring to the Supreme Court of the United States."

So, at page 901, he refers to "the question of freedom or slavery" as the question intended. Daniel Webster also understood the *habeas corpus* clause in the same way, for he says (*ib.*, page 900): "That very provision contains the sum and substance of good in the whole; because, suppose a person sues a colored person in New Mexico, claiming him as a slave, and confines him, and a *habeas corpus* is moved for be-

fore one of the judges, and upon the hearing of that *habea corpus* the order of the judge is to remand the colored persons to the place from whence he came, there he decides *the question of personal freedom* necessarily, and he decides it finally, unless there is an express provision in the same law to give a jurisdiction to the Supreme Court of the United States; and he decides it without a jury, about which a good deal has been said," &c.

Mr. Hamlin also said (*ib.*, page 901):

"In relation to the difficulties arising under an appeal from a [decision upon a writ] of *habeas corpus*, my simple answer is that it is a right which has been exercised in all the States where that *species of property* has been held."

Mr. Underwood having proposed an amendment to the clause providing for the review of final decisions of a specified pecuniary importance by adding the words "or where the personal liberty of any person is involved" (*ib.*, page 899), Daniel Webster suggested that "it does not embrace the case of *habeas corpus*;" to which Mr. Underwood replied:

"The gentleman says that it does not embrace the case of *habeas corpus*. I do not know whether it ought to embrace that case. There may be cases of *habeas corpus* in relation to white people as well as black people; in relation to persons arrested for crime as well as to persons kept in custody as slaves. There may be *habeas corpus* cases embracing a variety of causes of complaint by which the detention of the individual occurred. Now, I presume that you would have to go into the distinction between *habeas corpus* cases of this description and cases where personal liberty is involved to discriminate between them. I do not see the necessity of that discrimination; but if the question of slavery should arise it would be settled by a suit under my amendment."

But Mr. Badger objected to Mr. Underwood's amendment, as follows (*ib.*, page 901):

"In the first place, the amendment is exceedingly uncertain in its application to a case involving personal liberty—I believe that is the expression. Now, sir, introduced into the bill in that connection, I do not see but it may involve the question touching persons confined as idiots or lunatics or any other inquiry in which it shall be a matter affecting the discharge from confinement of persons in restraint from any cause whatever. Suppose a man is charged with committing a theft, a burglary, or murder; if he takes out a writ of *habeas corpus*, the question will affect his personal liberty, and he would think it no answer for my friend from Kentucky to say, though he was confined in jail by the award of the judge and kept there, it really was a transaction not affecting his personal liberty."

Here was a clear distinction drawn between the question of unlawful restraint involved in every case of *habeas corpus* and "the question of personal freedom," as intended by the amendment of Mr. Hale.

Mr. Badger added:

"Now, Mr. President, as to the amendment proposed by the Senator from New Hampshire: Why should we not adopt it? The provision is clear. It is an amendment that was carefully prepared two years ago by one of the first legal minds in the country. It was proposed and adopted by a very large majority of the Senate in the bill known as the Clayton compromise bill. Therefore, *prima facie*, from the mere fact of the case, it is more likely to be proper, to be effectual, to be certain, to answer the object in view, than the interpolation of a word that my friend from Kentucky wants to place there."

Mr. Berrien's remarks show his understanding of the limited signification of the *habeas corpus* clause:

"I am willing, in the same spirit which prompted me to vote for this amendment in the Clayton compromise bill, to acquiesce in this amendment, without believing in its necessity, for the decision of the circuit court referred to by the Senator from South Carolina (Mr. Butler) was this: that the limitation of $1,000, which is the limit of appeal in the Dis-

trict of Columbia, is not to apply to the case of an appeal made by a slave or person claiming his freedom, who had been decided in that court to be a slave. * * * The decision was against the negro, and he took the appeal to have his personal liberty ascertained. The limitation of $1,000 could not apply, because personal liberty was inappreciable."

See Lee *v.* Lee, 8 Pet., 44.

The maxim *noscitur a sociis* is plainly applicable in the construction of the two statutory clauses relating to the review by this Court of cases involving the "title to slaves" and "the question of personal freedom." They played a great part in the "compromise measures of 1850."

Read the significant phraseology of the 21st section of the bill to repeal the 8th section of the Missouri compromise, referred to by Truman Smith in his speech in the Senate February 10, 1854 (Appendix to *Congressional Globe*, 1st sess. 33d Congress, vol. 29, page 172). This bill was reported by the Senate Committee on Territories, and it contained the following:

"SEC. 21. *And be it further enacted*, That in order to avoid all misconstruction it is hereby declared to be the true intent and meaning of this act, so far as the *question of slavery* is concerned, to carry into practical operation the following propositions and principles established by the compromise measures of 1850, to wit:

"*First.* That all questions pertaining to slavery in the Territories and in the new States to be formed therefrom are to be left to the decision of the people residing therein, through their appropriate representatives.

"*Second.* That 'all cases involving title to slaves' and 'questions of personal freedom' are referred to the adjudication of the local tribunals, with the right of appeal to the Supreme Court of the United States.

"*Third.* That the provisions of the Constitution and laws of the United States in respect to fugitives from service are to be carried into faithful execution in all the 'organized Territories,' the same as in the States."

Imagine the surprise of Daniel Webster had he been told that such provisions affecting the question of freedom or slavery as a status had been been invoked to give jurisdiction to this Court to determine whether or not a New Mexican probate clerk had been wrongfully *enslaved* by a commitment for his open defiance of a plain order of the highest court of general original jurisdiction in his Territory!

It has never been the policy of the National Legislature to molest this overburdened Court with all species of cases arising in the Territories under writs of *habeas corpus*. Had so strange a policy been adopted it would have been made applicable to all the Territories without invidious discrimination. It would have been an absurd policy to extend such appellate right to every case of restraint of liberty, especially in view of the universal doubt as to the conclusiveness of an adjudication in *habeas corpus*.

It is preposterous to suppose that vagrants and other petty offenders were deemed worthy of the privilege of an appeal to this Court in that form of procedure while citizens accused of felonies, whose very lives might be claimed as forfeit to the law, were debarred from appeals or writs of error for the review by this tribunal of their conviction by territorial courts.

Every lawyer knows that, notwithstanding the utmost judicial caution, egregious errors in the exclusion or admission of evidence occur in the administration of the criminal laws, and that the question, not of mere "freedom or slavery," but of *life* or *death*, may turn upon a judicial error thus perpetrated.

The cases of *Stokes* v. *The People of the State of New York* (53 N. Y., 174) and *Wiggins* v. *The People, etc., in Utah* (93 U. S., 465) are instances directly in point.

Yet Congress has seen fit, as a general rule (and always in regard to New Mexico), to deny to the victims of such errors the right to a review in this Court. It has always

(and with legislative wisdom) confided the weighty trust of final adjudication in criminal cases arising in that Territory to the supreme court of New Mexico. In the language of Chief Justice MARSHALL (*Ex parte* Watkins, 3 Pet., page 207)—

"The law trusts that court with the whole subject and has not confided to this Court the power of revising its decisions."

Therefore, while it would be to me a greater personal satisfaction to have the present case decided on the merits and the judgment affirmed, I feel it my duty to ask that the appeal be dismissed.

JNO. H. KNAEBEL,
Of Counsel for Appellee.

E. L. BARTLETT,
Solicitor General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 1648.

PEDRO DELGADO, APPELLANT,

vs.

FRANCISCO CHAVES, SHERIFF, &c.

Appellee's Brief in Opposition to Appellant's Motion to Admit Him to Bail.

I. Judicial propriety and the comity of courts suggest the maintenance of the *status quo*, pending the consideration of this appeal.

The motion is disregardful of this suggestion, and involves

II. The appellant is confined only so long as he persists in his contumacy. The moment that he submits his will to that of the law he is free. So the territorial supreme court, in its final order, has expressly directed.

Transcript, page 37.

III. The commitment is in the nature of a final sentence. To order bail would amount to a provisional or temporary reversal of the judgment. But that judgment, *prima facie*, bears on its face the presumption of jurisdiction to render it. The judgment in contempt, pronounced while the appellant was in court, made him "instantly a prisoner."

Whitechurch's Case, 1 Atk., 57.

People vs. *Nevins*, 1 Hill, at page 163.

From the nature of the case, the principle of *supersedeas* is inapplicable, for that does not extend to a judgment, but merely to an execution; and the present judgment is one which concerns immediately the dignity of the district court, and which ought to be left wholly within the control of that tribunal. "Nor is there in the system of Federal jurisprudence any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power."

Ex parte Fisk, 113 U. S., at page 718.

Appellee's 3d point, page 5 of brief.

III. To take bail would be *pro tanto* to approve the appellant's course in defying the territorial courts. It would

amount to an intimation by this Court that it believes that there is *no lawful cause* for the imprisonment, or at least has serious doubts on the subject; and this in anticipation of its consideration of the arguments and, what is more important, the printed briefs.

IV. Of course, this motion (if in any sense it is to be deemed regular) could not be granted unless upon sufficient grounds, specifically stated, and no grounds whatever are alleged, except the fact that the Court has heard the oral arguments. Whether or not the argument for the appellant involves a simple postulate, immediately compelling the assent of the Court to its validity, is for the Court to say. I must content myself with saying (assuming this Court to have jurisdiction) that it appears that the district court had jurisdiction of the subject-matter and the parties; that it had jurisdiction to find that the relators were in office *de facto* as well as *de jure;* that the court had jurisdiction to find that the relators' certificates of election, coupled with their official oath and bond, were, under § 344 of the Compiled Laws (Appellee's Brief, page 29), "sufficient" for each "such person to act as such commissioner;" that it had jurisdiction to find that the appellant's answer was "insufficient" in law (Comp. Laws, § 1999; Appellee's Brief, page 21); that it had jurisdiction to find that answer to be false in fact and contradictory of the very records of the court; that it had jurisdiction to find that the pretenders, championed by the clerk, were mere political adventurers, sailing under false colors—holding false "certificates," fraudulently fabricated, in open contempt of the prior order of the court recited in our petition and without official standing, either *de facto* or